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CRAWFORD REALTY AND DEVELOPMENT
CORPORATION,

Appellee,

v.

WOODLAW TRUST AND SAVINGS BANK,
as Trustee, etc., et al.,
Appellees,

and

W. F. GILLINGER, et al.,
Appellants.

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APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

61
139
314 I.A. 188

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action filed by the plaintiff corporation November 12, 1935, to quiet the title to certain tracts of vacant real estate described in the complaint, there was service by publication, default of defendants and a decree for plaintiff on June 2, 1936. Gallinger, Plaisier, and others, filed petitions praying the decree might be set aside. The petitions were filed under §50 () of the Civil Practice Act (Smith Hurd's Anno. Stat. Chap. 110, par. 174, p. 404). Plaintiff answered the petitions, the cause was referred to a master who took the evidence and reported, recommending the decree of June 2, 1936, stand and the petitions dismissed for want of equity. Exceptions were overruled, a decree as recommended entered July 16, 1938, and petitioners appeal.

The facts reported by the master are that the Kaspar American State Bank, as trustee, was vested with the legal title of these premises and held the same under a declaration of trust for the use and benefit of Charles C. Cross, Joseph A. Hinkamp, Edgar R. Redlich and J. Hinkamp. The declaration of trust provided that the interest of any beneficiary should consist solely of a power of direction to deal with the title through a committee of three members or through Robert P. Webb; also the right to receive the proceeds from the rentals or sales made of any part of the premises, all of which should be deemed personal property.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

In an action filed by the Plaintiff corporation November 17, 1930, to quiet title to certain tracts of vacant land at
not described in the complaint, there was service by publica-
tion, return of defendant and a decree for plaintiff on June 2,
1931. Defendant, William H. Miller, and others, filed petitions praying
the same might be set aside. The petitions were filed under
§80 (1) of the Civil Practice Act (Smith's Annos. Stat. Chap.
110, art. 174, p. 404). Plaintiff answered the petitions, the
same were referred to a master who took the evidence and reported,
recommending the decree of June 2, 1931, stand and the petitioners
disseal for want of equity. Petitions were overruled, a de-
crees recommended entered July 16, 1931, and petitioners appeal.

The facts reported by the master are that the said
American State Bank, a trustee, was vested with the legal title
of these premises and held the same under a declaration of trust
for the use and benefit of Charles C. Gross, Joseph A. Winkham,
Edw. J. Hedlich and E. Winkamp. The declaration of trust pro-
vided that the interest of any beneficiary should consist solely
of a right of direction to deal with the title through a committee
of three members or through Robert P. Webb; also the right to

Joseph A. Hinkamp, Redlich and Cross incorporated Hinkamp & Company, each of these three holding one-third of its capital stock. The Kasper Bank sold the premises to other banks which took title as trustee in each case. Robert P. Webb, at first a salesman for Hinkamp & Company, later became one of the beneficiaries and the vice president, treasurer, and a director of Hinkamp & Company. Hinkamp & Company was agent to sell. In order to sell business lots in these subdivisions the beneficiaries organized what were known as Hinkamp Syndicates. A trust agreement was prepared for each syndicate which designated the proper bank as trustee, fixed the unitization of each syndicate and divided its units into \$500 each. Hinkamp & Company sold shares in these syndicates to approximately 644 persons and issued to them certificates showing their interest in the premises. Each certificate recited the name of the holder, the amount of shares or units purchased, the sum of money paid on account, etc. This plan was often used during the boom days to dispose of real estate. The certificates, however, while they described real estate, provided that the holder of the certificate should have an interest only in the proceeds of the sale of the premises and not any interest in the land therein described. Then came the depression. The certificate holders defaulted on payments they had agreed to make and vendee banks who had purchased or contracted to purchase the lands from the Kaspar American State Bank also defaulted in the payment of obligations under their contracts. The dissatisfied holders recorded certain certificates and the purpose of this suit is to have their apparent interest removed as clouds upon the title of plaintiff, who through mesne conveyances has become the owner in fee simple of these tracts of land. As already stated the decree is in favor of the plaintiff.

Joseph A. Hinkamp, Edlich and Gross Incorporated Hinkamp &

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shares in these syndicates to approximately 600 persons and issued to them certificates showing their interest in the premises. Each certificate recited the name of the holder, the

amount of shares or units purchased, the sum of money paid on account, etc. This plan was often used during the boom days to dispose of real estate. The certificates, however, while they

described real estate, provided that the holder of the certificate should have an interest only in the proceeds of the sale of the premises and not any interest in the land therein described.

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and interest removed as clouds upon the title of plaintiff, who through some conveyances has become the owner in fee simple of these tracts of land. As already stated the decree is in favor

of the plaintiff.

It is contended for reversal that the court erred in entering a final decree. It is said that the hearing provided for by §50 (8) of the Civil Practice Act is not a final hearing on the merits but only a preliminary hearing on the petitioner's right to answer, and in support of this contention the defendants cite Bruner v. Battell, 83 Ill. 317, 323; Philip Gollner Co. v. Gillette, 216 Ill. App. 25; Sullivan v. Sullivan, 275 Ill. App. 597; First Cong. Church v. Page, 257 Ill. 472, 476, and Correll v. Grieder, 245 Ill. 378, 381.

The record shows that this point was raised upon the hearing before the master; that the master ruled that under the pleadings the hearing was on the merits and advised the point be presented to the court before hearing testimony on the merits. The defendants presented a petition to the chancellor who indicated he would accept the view of the master, whereupon defendants withdrew their petition to have the hearing limited to the preliminary question and the parties proceeded to offer evidence on the merits. Irrespective of the construction which might be put upon §50 (8), we hold that by so proceeding the petitioners acquiesced in the ruling of the master and chancellor and cannot now, in view of this voluminous record, be heard contend that the court had only power to settle the preliminary question.

Defendant also contends that the complaint was multifarious and that the defects in process were such that jurisdiction of the court over defendants was not acquired. For the same reason (namely that they proceeded to hear the cause on its merits) they cannot now be heard to urge this contention.

It is urged that the Kaspar American State Bank was without authority under its contracts to declare a forfeiture because these contracts contained no provision that time should be of the essence thereof, and in support of this contention

It is contended for reversal that the court erred in entering a final decree. It is said that the hearing provided for by §50 (8) of the Civil Practice Act is not a final hearing on the merits but only a preliminary hearing on the defendant's right to answer, and in support of this contention the defendant cites Brannan v. Battell, 83 Ill. 217, 323; Phillips v. Sullivan, 216 Ill. App. 216, 217, 218; Sullivan v. Sullivan, 216 Ill. App. 216, 217, 218; First State Bank v. P. Co., 257 Ill. 472, 473, 474, and Corbett v. Gruber, 245 Ill. 378, 381.

The record shows that this point was raised upon the hearing before the master; that the master ruled that under the pleading the hearing was on the merits and advised the point be presented to the court before hearing testimony on the merits. The defendant presented a petition to the chancellor who indicated he would accept the view of the master, whereupon defendant withdrew their petition to have the hearing limited to the preliminary question and the parties proceeded to offer evidence on the merits. In respect of the constitution which might be put upon §50 (8), we hold that by so proceeding the petitioners acquiesced in the ruling of the master and chancellor and cannot now, in view of this voluminous record, be heard to contend that the court had only power to settle the preliminary question.

Defendant also contends that the complaint was null and void and that the defects in process were such that jurisdiction of the court over defendant was not acquired. For the same reason (namely that they proceeded to hear the case on its merits) they cannot now be heard to urge this contention. It is urged that the Legal American State Bank was without authority under its contracts to declare a forfeiture because these contracts contained no provision that they should be of the essence thereof, and in support of this contention

Clark v. Lyons, 25 Ill. 105, is cited. The case is not at all controlling. The question there involved was one of whether a mere delay in payment would justify a forfeiture. The Supreme Court held it did not. In this case it is not a question of delay but rather a question of whether these purchasers shall be allowed to hold their interest without paying at all. They do not ask time to pay; they do not offer to pay at any time whatsoever. As a matter of fact, they wish to rescind their purchases on the ground of fraud and at the same time keep whatever interest they purchased. This, of course, they cannot do. The master found, as a matter of fact, that there was no fraud or misrepresentation in the sale to these defendants of their syndicate certificates, and it is argued by the plaintiff that, as a matter of fact, there was no fraud. Their contention is based on the fact undenied that there was at this time a great rise in the value of real estate and that any of the representations which may have been made to purchasers were justified. An examination of the evidence leads us to grave doubt on this proposition. However that may have been, the evidence shows that these defendants at no time took the position that they had been defrauded up to the time their petitions were filed in the trial court. The plaintiff points out that nothing is better established in the law than that he who seeks to rescind for fraud must not speculate upon a possible profit, notwithstanding the fraud, but must act promptly to enforce his rights upon learning of it. Day v. Fort Scott Investment Co., 153 Ill. 293, 304; Greenwood v. Fenn, 136 Ill. 146, 158; Kanter v. Ksander, 344 Ill. 408, 415, are cited.

The solicitors in this case were familiar with all the facts and both of them testified. The testimony of defendants' solicitor is to the effect that the subscribers did not continue

Clark v. Lyons, 22 Ill. 102, is cited. The case is not at all controlling. The question then involved was one of whether a mere delay in payment would justify a foreclosure. The Supreme Court held it did not. In this case it is not a question of delay but rather a question of whether these purchasers shall be allowed to hold their interest without paying at all. They do not ask time to pay; they do not offer to pay at any time whatsoever. As a matter of fact, they wish to rescind their purchases on the ground of fraud and at the same time keep whatever interest they purchased. This, of course, they cannot do. The master found, as a matter of fact, that there was no fraud or misrepresentation in the sale to these defendants of their syndicate certificates, and it is argued by the plaintiff that as a matter of fact, there was no fraud. Their contention is based on the fact undenied that there was at this time a great rise in the value of real estate and that any of the representations which may have been made to purchasers were justified. An examination of the evidence leads us to have doubt on this proposition. However that may have been, the evidence shows that these defendants at no time took the position that they had been defrauded up to the time their petitions were filed in the trial court. The plaintiff points out that nothing is better established in the law than that he who seeks to rescind for fraud must not speculate upon a possible profit, notwithstanding the fraud, but must act promptly to enforce his rights upon learning of it. 221 v. Fort Scott Investment Co., 155 Ill. 232, 304; Greenwood v. Penn, 128 Ill. 145, 183; Kankey v. Kankey, 344 Ill. 408, 415, are cited.

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their payments because of the depression and because they didn't have the money. They made no claim that they had been defrauded or that the property was overpriced or that they did not get what was sold to them. Defendants cite a number of cases but all are clearly distinguishable.

The decree will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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AFFIRMED.

McGuire, J. J., and O'Connor, J., concur.

41251

OSCAR P. RUBARDT,
Appellant,

v.

MARIE RUBARDT SALZMAN and HAROLD L.
SALZMAN,
Appellees

—
MARIE RUBARDT SALZMAN,
Appellee,

v.

OSCAR P. RUBARDT,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

314 I.A. 189'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

November 30, 1937, Oscar P. Rubardt filed his complaint in equity against his daughter, Marie Rubardt Salzman, and her husband, Harold L. Salzman. The bill prayed for the return of property taken, an injunction against further transfer, that alleged articles of co-partnership should be declared void, an accounting taken and other relief.

An injunction issued December 3 against defendants and their attorney, Al Martin Curtis. The Salzmanns answered denying the equity of the complaint and filed a counterclaim attaching a copy of the alleged articles of co-partnership. The counterclaim prayed the partnership might be held valid and dissolved for the fault of O. P. Rubardt, a receiver appointed, and an accounting taken.

The complaint, the answer and the counterclaim were verified. February 7, 1938, the cause was referred to a master to report "relating only to the existence of a co-partnership". The master reported there was a partnership, under (Smith-Hurd's Anno. Stat., Chap. 106 1/2, §7, p. 721). The court overruled exceptions and entered an order approving the report and rereferring the cause to state the account. The master filed his

41251

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An injunction issued December 3 against defendants and their attorney, Al Martin Curtis. The Salzmans answered denying the equity of the complaint and filed a counterclaim attaching a copy of the alleged articles of co-partnership. The counterclaim prayed the partnership might be held valid and dissolved for the fault of O. P. Rubenst, a receiver appointed, and an accounting taken.

The complaint, the answer and the counterclaim were verified. February 7, 1938, the cause was referred to a master to report "relating only to the existence of a co-partnership". The master reported there was a partnership, under (Martin-Curtis' Anno. Stat., Chap. 106 1/2, § 701). The court overruled exceptions and entered an order approving the report and referring the cause to a master to report.

second report with extended findings of fact and law. Plaintiff's exceptions were overruled and a final decree entered February 23, 1940.

The decree finds that Oscar P. Rubardt entered into a partnership with his daughter, Marie Rubardt Salzman, on May 1, 1933 under the name of O. P. Rubardt & Co.; that it was an equal partnership as to assets and profits; that Oscar P. Rubardt wrongfully caused the dissolution of it; that certain valuable trademarks registered in the name of Oscar P. Rubardt and never assigned by him were a part of the partnership assets; that the real estate on which the business is conducted, title to which is in the name of Oscar P. Rubardt, is also a part of the partnership assets; that Oscar P. Rubardt caused the dissolution of the co-partnership wrongfully and that, therefore, in computing the value of his interest the good will of the business should not be considered; that it is just and equitable that the possession and management of the property and business of O. P. Rubardt & Company should be forthwith delivered and surrendered to the defendant and counterclaimant, Marie Rubardt Salzman under (Smith-Hurd Anno. Stat., Chap. 106 1/2, §38, pp. 760-761).

Plaintiff argues the findings of the master and the decree are against the manifest weight of the evidence. After careful consideration of, the reports of the master, the findings of the decrees, hearing the oral argument of counsel, and not unmindful of the weight to be given to findings of fact by a master when approved by the chancellor, we are persuaded the contention must be sustained.

Plaintiff at the time of the hearing was 72 years of age. He was born in Denmark, came to this country when 23 years of age and worked as an interior decorator. Later he became an importer of dyes. During the First World War it became impossible

second report after examining findings of fact and law. Plaintiff's exceptions were overruled and a final decree entered February 23, 1940.

The decree finds that Oscar P. Rubardt entered into a partnership with his daughter, Marie Robert Selman, on May 1, 1933 under the name of O. P. Rubardt & Co.; that it was an equal partnership as to assets and profits; that Oscar P. Rubardt wrongfully caused the dissolution of it; that certain valuable trademarks registered in the name of Oscar P. Rubardt and never assigned by him were a part of the partnership assets; that the real estate on which the business is conducted, title to which is in the name of Oscar P. Rubardt, is also a part of the partnership assets; that Oscar P. Rubardt caused the dissolution of the co-partnership wrongfully and that, therefore, in computing the value of his interest the good will of the business should not be considered; that it is just and equitable that the possession and management of the property and business of O. P. Rubardt & Company should be forthwith delivered and surrendered to the defendant and counterclaimant, Marie Robert Selman under (Smith-Rand Anno. Stat., Chap. 108 1/2, §38, pp. 750-751).

Plaintiff argues the findings of the master and the decree are against the manifest weight of the evidence. After careful consideration of the reports of the master, the findings of the decree, hearing the oral argument of counsel, and not manifesting of the weight to be given to findings of fact by a master who is approved by the Chancellor, we are persuaded the contention must be sustained.

Plaintiff at the time of the hearing was 75 years of age. He was born in Denmark, came to this country when 23 years of age and worked as an interior decorator. Later he became an importer of dyes. During the first world war it became impossible

to import. In 1916 he began to manufacture dyes. He specialized in two colors, ecru and cream. He added other formulas. At first he carried on the business in his garage. He was sole owner. He did the work and kept the books. The business prospered. It was moved to 5116 North Ravenswood Avenue into a building owned by him. He registered in his name trade-marks for his products which were known as "Pro Dura Tint and Dye Tablets".

In 1893 he married Marie Rubardt. They had three daughters, Thyra, who married Mr. Jensen, Ethel, who became Mrs. Ulrey, and Marie, who on October 26, 1934, was married to Dr. Harold L. Salzman, a dentist, co-defendant. Mrs. Marie Rubardt obtained a divorce from her husband in 1923 on the ground of cruelty. They were remarried in 1932. After this litigation was begun she sued for separate maintenance.

In 1927 Mr. Rubardt became ill and arrangements were made with the two daughters, Ethel and Marie, who were then in California with their mother, to come to Chicago and work in his business. They came and entered on the work with skill and energy. Mr. Rubardt was absent much of the time. In his absence he trusted everything to Marie. She took care of the books, drew checks, and purchased securities for her father. Her sister, Thyra, lived at Eau Claire, Wisconsin, with her husband, Arthur Jensen. Ethel and Marie at first were paid about \$25 each per week. This compensation from time to time was increased. Rubardt went to Denmark almost every year. He owned a home in Florida and usually was there from November to April or May. The business prospered. The books show that the net profit before making provisions for depreciation and adjustments for inventory variation, for these years were: 1930, \$31,349.80; 1931, \$33,759.03; 1932, \$36,308.59; 1933, \$36,376.34; 1934, \$36,997.04; 1935,

to import. In 1916 he began to manufacture dyes. He specialized in two colors, brown and cream. He sold other formulas. At first he carried on the business in his garage. He was sole owner. He did the work and kept the books. The business prospered. It was moved to 5116 North Ravenswood Avenue later. He registered in his name trademarks for his products which were known as "Pro Hair Tint and Eye Tint".

In 1923 he married Marie Hubardt. They had three daughters, Thyrus, who married Mr. Jensen, Ethel, who became Mrs. Ulrey, and Marie, who on October 26, 1924, was married to Dr. Harold L. Coleman, a dentist, co-defendant. Mrs. Marie Hubardt obtained a divorce from her husband in 1925 on the ground of cruelty. They were remarried in 1932. After this litigation was begun she sued for separate maintenance.

In 1927 Dr. Hubardt became ill and arrangements were made with the two daughters, Ethel and Marie, who were then in California with their mother, to come to Chicago and work in his business. They came and entered on the work with skill and energy. Dr. Hubardt was absent much of the time. In his absence he treated everything to Marie. She took care of the books, drew checks, and purchased securities for her father. Her sister, Thyrus, lived at New Orleans, Louisiana, with her husband, Arthur Jensen. Ethel and Marie at first were paid about \$25 each per week. This compensation from time to time was increased. Hubardt went to Denmark almost every year. He owned a home in Florida and usually was there from November to April or May. The business prospered. The books show that the net profit before making provisions for depreciation and adjustments for inventory variation for these years were: 1930, \$1,049.60; 1931, \$1,709.02; 1932, \$2,708.22; 1933, \$3,378.24; 1934, \$3,074.04; 1935,

\$40,191.92; 1936, \$50,287.84; 1937, \$45,502.72; 1938 (for 6 months) \$25,784.59.

The daughter, Ethel, married Mr. Ulrey. A son was born. There was a divorce, and Mr. Rubardt made provision for the family. Marie Rubardt was 23 years of age when she began to work for her father. He came to have complete confidence in her. In 1933, the father, mother and Marie made a trip together to Europe at his expense. Marie was often with them at the Florida and Wisconsin homes.

The pleadings of Mrs. Salzman aver that prior to May 1, 1933, the business was conducted largely as a family enterprise under an oral agreement. Whether there was an agreement, it is a fact that Mr. Rubardt paid considerable amounts for the support, maintenance and pleasure of his own and the families of his daughters. If there was any intention May 1, 1933, to supersede this agreement with another, there is no evidence tending to show consultation with other members of the family with reference thereto.

The principal controversy is whether a partnership in fact existed. Defendants rely much on the writing dated May 1, 1933. The evidence shows this writing was prepared by Leo Kradin, a "tax counsellor". Mr. Kradin testified on the first reference; he was not called on the second. His testimony is that he met plaintiff in an auto repair shop where they were introduced by a Mr. Norgaard. Kradin says that Norgaard recommended him to Mr. Rubardt as an expert in tax problems. Later Kradin was called in by Marie Rubardt (now Mrs. Salzman) to make out the income tax returns. Kradin prepared the returns from 1930 up to and including 1936. Mr. Kradin says Mr. Rubardt talked with him in April, 1933, and later came to his office with Marie. Kradin says Mr. Rubardt asked him about a partnership. Kradin told him

55.7.25 (continued)

There was a divorce, and Mr. Hubert's wife provided for the in-

for her father. He came to have complete confidence in her. In

at his expense, a often with them to the islands and

WISCONSIN

1933, the first was conducted largely as a fairly extensive

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daughter. If there was any intention May 1, 1937, to execute

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of rent

fact exists. Defendants rely now on the writing dated May 1,

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But it is an expert in tax problems. Later, Lewis was called in

return. This is reported in return from 120 and 100

April, 1937, and later came to his office with mother. Kravitz

... Kravitz told him

there would be many advantages. Kradin also says he told Rubardt the only change needed would be in the investment account; that there should be one for Rubardt, another for Marie. Rubardt then asked him to draw an agreement, saying it was merely a family affair that would not require a lawyer. Kradin says he next saw Rubardt and Marie at the office of O. P. Rubardt & Company. Kradin got a printed form of agreement for partnership, took it to the office May 1, 1933, and asked Marie to fill it out with the typewriter. She did this, her father listening while he (Kradin) dictated. He swears positively Marie and Mr. Rubardt signed the writing there at that time. The agreement was made and a carbon. Kradin took the original and filed it for record. He afterwards picked it up at the recorder's office and mailed it to the office of O. P. Rubardt & Company. The cross mark in front of Marie's signature is not explained.

Rubardt denies the instrument was executed at the time or in the manner Kradin recites. He admits his signature is genuine. He denies he signed the writing at that time or with any intention to create a partnership. He says he was away from home much of the time, was in ill health and often signed papers submitted to him by his daughter without examination. The inference is that his signature was obtained surreptitiously.

Marie (Mrs. Salzman) says the agreement was executed May 1, 1933, in the office, then at 2847 McLean Avenue. In general, she corroborates the testimony of Kradin. She says her father had prior to this time talked with her about a partnership and said she was entitled to be a partner because of the help she had been to the business. More than three years afterwards, Mrs. Salzman says, while in Florida in 1936, she obtained her father's signature to a card for the bank account at the First National Bank. The card is in evidence. The word "partners" is

there would be any witnesses. Kradin also says he told Rupardt the only change needed would be in the investment account; that there should be one for Rupardt, another for Marie. Rupardt then asked him to draw an agreement, saying it was merely a family affair that would not require a lawyer. Kradin says he next saw Rupardt and Marie at the office of O. P. Rupardt & Company. Kradin got a printed form of agreement for partnership, took it to the office May 1, 1935, and asked Marie to fill it out with the typewriter. She did this, her father listening while he (Kradin) dictated. He swears positively Marie and Mr. Rupardt signed the writing there at that time. The agreement was made and a carbon. Kradin took the original and filed it for record. He afterwards picked it up at the recorder's office and mailed it to the office of O. P. Rupardt & Company. The cross mark in front of Marie's signature is not explained. Rupardt denies the instrument was executed at the time or in the manner Kradin recites. He admits his signature is genuine. He denies he signed the writing at that time or with any intention to create a partnership. He says he was away from home much of the time, was in ill health and often signed papers submitted to him by his daughter without examination. The instrument is that his signature was obtained surreptitiously. Marie (Mrs. Balman) says the agreement was executed May 1, 1935, in the office, then at 2347 McLean Avenue. In general, she corroborates the testimony of Kradin. She says her father had prior to this time talked with her about a partnership and said she was entitled to be a partner because of the help she had been to the business. More than three years afterwards, Mrs. Balman says, while in Florida in 1936, she obtained her father's signature to a card for the bank account at the First National Bank. The card is in evidence. The word "partnership" is

written on it in the handwriting of Rubardt. He admits his signature but says he does not remember when he signed it. Mrs. Salzman kept the books and with Kradin prepared and filed the income tax returns. Kradin made entries which it is now argued show a partnership set up. The date of entry is indefinite - "May, 1933". It is on page 23 of the cash journal. It shows an investment credit of \$16,762.59 each for Marie Rubardt and O. P. Rubardt. These amounts represented the net worth of the business as shown by the books December 31, 1932. The figures are purely arbitrary in so far as the supposed partnership set up is concerned. There was no computation of profits from December 31, 1932, to May 1, 1933, the date of the agreement. The figures, as Mrs. Salzman admits, included much personal property of Mr. Rubardt's. As a matter of fact, May 1, 1933, did not mark any actual change in the way the business was conducted. Mrs. Salzman continued her services as formerly and drew her weekly salary as usual. Rubardt continued to withdraw cash from the business as theretofore. In the year 1934 he withdrew in cash \$43,363.11.

An accountant hired by Mrs. Salzman afterwards undertook to allocate the income of the business to Mrs. Salzman and her father one-half to each. There are no entries on the books made in the usual course of business justifying such allocation. Entries made later by the accountant are purely arbitrary and for the purposes of the suit. Mrs. Salzman continued to keep the books. There are no entries by her allocating profits of 1933 as between herself and her father. There was no conveyance of the premises on which the business was conducted to the supposed partnership nor conveyances to it of any of the assets personally owned by Rubardt. There is no proof of notice to customers or the public, no change in the books or method of

written on it in the handwriting of Whitcomb. The name of his signature but says he does not remember when he signed it. Mrs. Salzman kept the books and with Krubin prepared and filed the income tax returns. Krubin made entries which it is now found show a partnership set up. The date of entry is indefinite - "May, 1933". It is on page 83 of the cash journal. It shows an investment credit of \$18,783.59 each for Krubin and Mrs. O. P. Rubenstein. These amounts represented the net worth of the business as shown by the books December 31, 1932. The figures are purely arbitrary in so far as the partnership set up is concerned. There was no computation of profits from December 31, 1932, to May 1, 1933, the date of the agreement. The figures, as Mrs. Salzman admits, included much personal property of Mr. Rubenstein's as a matter of fact, May 1, 1933, did not mark any actual change in the way the business was conducted. Mrs. Salzman continued her services as formerly and drew her weekly salary as usual. Rubenstein continued to withdraw cash from the business as theretofore. In the year 1934 he withdrew in cash \$43,363.11.

An accountant hired by Mrs. Salzman afterwards undertook to allocate the income of the business to Mrs. Salzman and her father one-half to each. There are no entries on the books made in the usual course of business justifying such allocation. Entries made later by the accountant are purely arbitrary and for the purpose of the suit. Mrs. Salzman continued to keep the books. There are no entries by her allocating profits of 1933 to Rubenstein and her father. There was no conveyance of the premises on which the business was conducted to the alleged partnership nor conveyance to it of any of the assets personally owned by Rubenstein. There is no proof of notice to customers or the public, no change in the books or method of

doing business, except as stated.

The writing provides the father and daughter are to become co-partners under the name of O. P. Rubardt & Company, to begin the 1st day of May, 1933, and continue for 25 years, or until terminated by mutual consent on 60 days' notice. Each party is to contribute \$10,000. Each may withdraw not more than \$50 per week for personal expenses to be deducted from profits, if there are profits, otherwise from the investment. In case of dissolution the invested capital is to be determined by replacement value, the party remaining to have the right to remunerate the withdrawing party by paying 50% cash and 50% in twelve equal monthly installments.

Neither of the parties made any contribution of \$10,000, although Mrs. Salzman's accountant credits her with \$10,000 and charges her with a loan from her father of the same amount. There was a credit to each of an investment of \$16,762.50, based on the net worth of the business December 31, 1932. There are no entries in the usual course of business showing such transaction. March 15, 1934, Mrs. Salzman filed her personal income return for the year 1933. In it she states under oath that her occupation is "office clerk" and that her income for the year was \$1,560. She and Kradin also made and filed on that date income return for O. P. Rubardt for 1933. This return states that he is the sole proprietor of O. P. Rubardt & Company. February 4, 1936, Mrs. Salzman made a return to the Census Bureau in which it was stated the name of the business was O. P. Rubardt & Company; that the name of the owner was O. P. Rubardt, and that there was only one proprietor. The return was under oath. The income tax return for the business for the year 1934 was prepared by Mrs. Salzman and Kradin and filed March 15, 1935. This return said the business was a co-partnership organized January 1, 1934,

doing business, except as stated.

The writing provides that on and after the 1st day of January, 1934, the partnership shall be dissolved and the partners shall become co-partners under the name of O. P. Hubbard & Company, to begin the 1st day of May, 1934, and continue for 3 years, or until terminated by mutual consent on 60 days' notice. Each party is to contribute \$10,000. Each may withdraw not more than \$50 per week for personal expenses to be deducted from profits, if there are profits, otherwise from the investment. In case of dissolution the invested capital is to be determined by re- placement value, the party remaining to have the right to rean- create the withdrawing party by paying 50% cash and 50% in twelve equal monthly installments.

Neither of the parties made any contribution of \$10,000, although Mr. Salzman's accountant credits her with \$10,000 and charges her with a loan from her father of the same amount. There was a credit to each of an investment of \$18,762.50, based on the net worth of the business December 31, 1933. There are no entries in the annual course of business showing such transac- tion. March 15, 1934, Mrs. Salzman filed her personal income return for the year 1933. In it she states under oath that her occupation is "office clerk" and that her income for the year was \$1,500. Mr. and Kresin also made and filed on that date income return for O. P. Hubbard for 1933. This return states that he is the sole proprietor of O. P. Hubbard & Company. February 1, 1934, Mrs. Salzman made a return to the United Bureau in which it was stated the name of the business was O. P. Hubbard & Com- pany; that the name of the owner was O. P. Hubbard, and that there was only one proprietor. The return was under oath. The income tax return for the business for the year 1934 was prepared by Mrs. Salzman and Kresin and filed March 15, 1935. This return said the business was a co-partnership organized January 1, 1934,

and that Marie Salzman and O. P. Rubardt each had a half interest in the net income and computed the income tax on that basis. Mr. Rubardt was out of the state at the times these returns were made and did not have any direct part in making them.

The first entry in the books indicating a withdrawal from the business by Mrs. Salzman for herself other than her weekly wages was made by her in the cash journal on April 28, 1936. On that date she charged herself with \$27,044.31, and drew out the same amount for her father. A few days afterwards she used this to purchase in her own name \$53,000 par value United States bonds at the price of \$54,088.26. She rented safety deposit box No. 44238 in her own name at the First National Bank and deposited these bonds in it. The bonds remained there until July 28, 1937, when she rented box No. 7729 at the First National Bank and placed the bonds in it. She gave her husband, Harold L. Salzman, power of attorney to enter this box. The United States government made a deficiency tax assessment against the business of \$38,757, covering the years from December 31, 1928, to December 31, 1937. The assessment shows fraud penalties for the calendar years 1930 to 1935 in the sum of \$9,415.51. As a matter of fact, Mrs. Salzman admits that in keeping the books the expense accounts were padded for the purpose of reducing the net income and thus the income tax. She charges she was coerced by her father to do this. She says he even threatened to have her prosecuted in order to compel obedience to his unlawful demands. He denies all this. He was not in Chicago when these returns were made and filed. Mrs. Salzman had a tax expert on whom she would naturally rely. Mr. Rubardt may have approved; he did not coerce Mrs. Salzman with reference to the income returns.

It is not certain just when Mrs. Salzman decided to

and that Marie Salzman and O. L. Rudardt each had a half interest in the net income and computed the income tax on that basis. Mr. Rudardt was out of the state at the time these returns were made and did not have any direct part in making them.

The first entry in the books indicating a withdrawal from the business by Mrs. Salzman for herself other than her weekly wages was made by her in the cash journal on April 28, 1938. On that date she charged herself with \$2,044.31 and drew out the same amount for her father. A few days afterwards she used this to purchase in her own name \$2,000 par value United States bonds at the price of \$4,082.40. She rented safety deposit box No. 4438 in her own name at the First National Bank and deposited these bonds in it. The bonds remained there until July 28, 1937, when she rented box No. 4725 at the First National Bank and placed the bonds in it. She gave her husband, Harold L. Salzman, power of attorney to enter this box. The United States Government made a deficiency tax assessment against the business of \$8,737, covering the years from December 31, 1938, to December 31, 1937. The assessment shows fraud penalties for the calendar years 1930 to 1935 in the sum of \$1,413.31. As a matter of fact, Mrs. Salzman admits that in keeping the books the expense accounts were padded for the purpose of reducing the net income and thus the income tax. She charges she was coerced by her father to do this. She says he even threatened to have her prosecuted in order to compel obedience to his unlawful demands. He denied all this. He was not in Chicago when these returns were made and filed. Mrs. Salzman had a tax expert on whom she would naturally rely. Mr. Rudardt may have approved; he did not oppose Mrs. Salzman with reference to the income returns. It is not certain just when Mrs. Salzman decided to

claim she was a half owner of the business. April 28, 1936, was the date upon which she withdrew money from the business and purchased \$53,000 in United States bonds in her own name and put these bonds with \$15,000 others owned by Mr. Rubardt in her own box. Dr. Salzman, her husband, knew of this transaction. It is perfectly clear Rubardt did not know. She did not inform him, although on less important matters she wrote with particularity about the business, as indicated by her letter of May 6, 1937, addressed to "Dear Papa", expressing much concern for his health and ending, "Love and Kisses, Marie".

The first break between Mrs. Salzman and her father arose about a real estate broker named Kester. Mr. Rubardt met him through Mr. Ulrey. Mr. Rubardt desired to purchase a \$50,000 mortgage for his three daughters and negotiated for it through Kester. He paid Kester \$5,000 as a down payment. Kester used the money for his own purposes and did not buy the mortgage. He finally admitted this to Mr. Rubardt and promised restitution. Mr. Rubardt talked with Mrs. Salzman and told her Kester was a crook. She resented this. About this time her whole attitude toward her father changed. When he asked questions she did not seem to wish to answer. He became suspicious. He went to his safety deposit box at the First National Bank and found it had been put in the name of Mrs. Salzman and that he could not have access. He telephoned her and requested her to meet him at the bank, which she did the following day and gave him access to box No. 7728. Mr. Rubardt took out the contents of the box, wrapped the securities in a paper, which he took to the office. He counted the cash. He made a list of the securities. He rewrapped all in the paper, handed it to Mrs. Salzman and told her to place the package back in the box. She did so. This would have been a good time to tell him of box No. 7729, in which was \$68,000 in

claim she was a half owner of the business. April 28, 1938, was the date upon which she withdrew money from the business and purchased \$25,000 in United States bonds in her own name and put these bonds with \$15,000 others owned by Mr. Hubardt in her own box. Dr. Salzman, her husband, knew of this transaction. It is perfectly clear Hubardt did not know. She did not inform him, although on less important matters she wrote with particularity about the business, as indicated by her letter of May 6, 1937, addressed to "Dear Papa", expressing much concern for his health and ending, "Love and kisses, Anita".

The first break between Mrs. Salzman and her father arose about a real estate broker named Kestor. Mr. Hubardt and him through Mr. Uhlrey. Mr. Hubardt desired to purchase a \$50,000 mortgage for his three daughters and negotiated for it through Kestor. He paid Kestor \$5,000 as a down payment. Kestor used the money for his own purposes and did not pay the mortgage. He finally admitted this to Mr. Hubardt and promised restitution. Mr. Hubardt talked with Mrs. Salzman and told her Kestor was a crook. She resented this. About this time her whole attitude toward her father changed. When he asked questions she did not seem to wish to answer. He became suspicious. He went to his safety deposit box at the First National Bank and found it had been put in the name of Mrs. Salzman and that he could not have access. He telephoned her and requested her to meet him at the bank, which she did the following day and gave him access to box No. 772. Mr. Hubardt took out the contents of the box, wrapped the securities in a paper, which he took to the office. He counted the cash. He made a list of the securities. He rewrapped all in the paper, handed it to Mrs. Salzman and told her to place the package back in the box. She did so. This would have been a good time to tell him of box No. 772, in which was \$25,000 in

securities belonging to Mr. Rubardt, \$15,000 of which had been purchased by him long prior to May 1, 1933. She did not avail herself of the opportunity.

After the remarriage of Rubardt to his divorced wife and up to the time of this difference the record indicates the mother, daughters and their three families were happy together. The evidence shows Mr. Rubardt was generous to them. The mortgage he negotiated to purchase through Kester for the daughters is only one of many instances. He seems to have been extraordinarily fond of Mrs. Salzman. Mr. Rubardt supported Ethel's family after she was divorced from her husband. In May, 1936, he presented his daughter, Mrs. Jensen, with twenty-one one hundred dollar bills. Her husband, Arthur Jensen, who testified for defendants, gives a picture of family felicity as it existed prior to 1937. In the fall of that year Mr. Rubardt told him he had a lot on his mind. Jensen says that this was the matter about Mr. Kester; that Mr. Rubardt said the sad part of the whole story was that his daughter seemed to be taking the side of Kester. As a matter of fact, it is hard to understand why the family took the part of Kester. He seems to have confessed his misappropriation of \$5,000 of Rubardt's money as the family knew.

Matters came to a climax at the office on October 11, 1937. The facts are narrated by Mrs. Salzman, Mr. Rubardt and Margaret Connolly (an employee), who were the only persons present. Mrs. Salzman came to the office about 11 o'clock in the morning. Mr. Rubardt asked her some questions. She made no answer. He asked her if he was not worthy of an answer, then talked about Kester. Rubardt said Kester was a crook. Mrs. Salzman, he says, said Kester was an honest man. Mrs. Salzman says she told her father, "He is not a crook and you should remember no man is a crook until he is proven a crook, and I heard him say he would

accounting belonging to Mr. Kester, \$2,000 of which had been purchased by him long prior to May 1, 1936. But he had not availed himself of the opportunity.

After the purchase of Kester to his divorced wife and up to the time of this divorce the record indicated the mother, and there and their three families were living together. The evidence shows Mr. Kester was generous to his wife. The mortgage he negotiated to purchase through Kester for the business is only one of many instances. It seems to have been extraordinarily fond of Mr. Kester. Mr. Kester supported Kester's family after she was divorced from her husband. In May, 1936, he presented his daughter, Mrs. Jensen, with twenty-one one hundred dollar bills. Her husband, Arthur Jensen, who testified for defendant, gives a picture of family felicity as it existed prior to 1936. In the fall of that year Mr. Kester told him he had a lot on his mind. Jensen says that this was the matter about Mr. Kester; that Mr. Kester said the bad part of the whole story was that his daughter seemed to be taking the side of Kester. As a matter of fact, it is hard to understand why the family took the part of Kester. He seems to have confessed his misappropriation of \$2,000 of Kester's money as the family knew.

Matters came to a climax at the office on October 11, 1937. The facts are narrated by Mrs. Salzman, Mr. Kester and Margaret Gennolly (an employee), who were the only persons present. Mrs. Salzman came to the office about 11 o'clock in the morning. Mr. Kester asked her some questions. She made no answer. He asked her if he was not worthy of an answer, then talked about Kester. Kester said Kester was a crook. Mrs. Salzman, he says, said Kester was an honest man. Mrs. Salzman says she told her father, "he is not a crook and you should remember no man is a crook until he is proven a crook, and I heard him say he would

give you that money back". She went into the laboratory. She says Mr. Rubardt followed her and said he wanted to dissolve the partnership. She also says he said, "I am going to clean everything out of the bank and I am going to clean everything out of the vault and I want you to give me the keys that belong here". She says she went into the larger office. He followed and grabbed the keys away from her. She tried to get a ring which belonged to her, and he put her aside. She says he struck her. He finally handed the ring to her. She says, "I opened the key ring, took off the key he wanted and handed it to him. I asked him if he were trying to crush me. He said, 'I am going to crush you again and again and again, and I want you to get out of here and stay out. If you don't get out, I will throw you out'."

Mr. Rubardt denies he struck her or used any such language and is corroborated by Margaret Connolly. Miss Connolly says Mrs. Salzman cried out, "Call the police". All agree that Mr. Rubardt went home and that Mrs. Salzman stayed. She was apparently excited. She and Miss Connolly took a drink of whiskey together, and for some time she talked bitterly about her father to Miss Connolly. Mr. Rubardt says Mrs. Salzman's last words to him at the office were, "You can't fire me"; that he replied, "What do you mean?"; that she said, "You will find out". If she made this last statement she spoke truly. When she left the office she went to the bank. Her attorney, Mr. Curtis, was with her. She took the contents of box No. 7728, more than \$4,000 in cash, \$96,000 in Treasury Notes and other securities. She also took from box No. 7729 the \$53,000 in United States Treasury Notes which she had purchased with funds taken from the business April 28, 1936, and \$15,000 of government bonds Mr. Rubardt owned prior to May 1, 1933. On October 13, she drew and cashed a check for \$20,000 on the bank account to her own order, practically ex-

give you that money back". She went into the laboratory. She says Mr. Hubbard followed her and said he wanted to dissolve the partnership. She also says he said, "I am going to clean everything out of the bank and I am going to clean everything out of the vault and I want you to give me the keys that belong here". She says she went into the lawyer's office. He followed and grabbed the keys away from her. She tried to get a ring which belonged to her, and he put her aside. She says he struck her. He finally handed the ring to her. She says, "I opened the key ring, took off the key he wanted and handed it to him. I asked him if he were trying to commit me. He said, 'I am going to commit you again and again and again, and I want you to get out of here and stay out. If you don't get out, I will throw you out'". Mr. Hubbard then he struck her or used any such language and is corroborated by Margaret Connolly. She Connolly says Mrs. Balman cried out, "Call the police". All agree that Mr. Hubbard went home and that Mrs. Balman stayed. She was apparently excited. She and Miss Connolly took a drink of whiskey together, and for some time she talked bitterly about her father to Miss Connolly. Mr. Hubbard says Mrs. Balman's last words to him at the office were, "You can't fire me"; that he replied, "What do you mean?"; that she said, "You will find out". If she made this last statement she spoke truthfully. Then she left the office and went to the bank. Her attorney, Mr. Gustis, was with her. She took the contents of box No. 7728, more than \$4,000 in cash, \$60,000 in Treasury notes and other securities. She also took from box No. 7728 the \$5,000 in United States Treasury notes which she had purchased with funds taken from the business April 28, 1935, and \$1,000 of Government bonds Mr. Hubbard owned prior to May 1, 1935. On October 15, she drew and cashed a check for \$20,000 on the bank account to her own order, practically ex-

hausting it. Prior to this time she had taken the ledger journal and the cash book to her apartment at the Edgewater Beach Hotel. She says her father told her to destroy them. He denies he did so. She had also taken the cancelled checks and books of check stubs. It is apparent Rubardt knew nothing about the securities that were in box No. 7729. His first knowledge of the appropriation of these securities came from his attorneys to whom an attorney for Mrs. Salzman, gave information that Mrs. Salzman had taken them.

Plaintiff filed suit November 30, 1937. His complaint describes carefully the securities, etc., of which he had made a list. None in box No. 7729 was included. Defendants' attorneys were before Judge Feinberg at the hearing on the injunction. They told the judge that plaintiff's attorneys had been given a complete list of securities taken. The list did not include this \$68,000 of securities in box No. 7729, and Mr. Curtis says he did not know about the taking of these at that time. Mrs. Salzman did not disclose these in her sworn pleadings. They are not included in the injunction. It is apparent Mr. Rubardt's first knowledge of this box No. 7729 and its contents was secured from defendants' attorney in February, 1938.

The decree is based upon the theory, first, that Mrs. Salzman was an equal partner in the business with her father; second, that Mr. Rubardt wrongfully excluded her from the business; and, third, that she was wholly without fault. In our opinion the evidence will not sustain any one of these theories.

In the first place, it appears the supposed partnership was created for the sole purpose of reducing the income tax the business would be required to pay. There was no intention to create a partnership with a view to sharing profits equally. This appears from the undisputed facts that the author of the

haunting it. Prior to this time she had taken the ledger, journal and the cash book to her apartment at the New West Beach Hotel. She says her father told her to destroy them. He denies he did so. She had also taken the cancelled checks and books of check stubs. It is apparent Hubbard knew nothing about the securities that were in box No. 7729. His first knowledge of the appropriation of these securities came from his attorneys to whom an attorney for Mrs. Salzman, gave information that Mrs. Salzman had taken them.

Plaintiff filed suit November 30, 1937. His complaint describes carefully the securities, etc., of which he had made a list. None in box No. 7729 was included. Defendants' attorneys were before Judge Feinberg at the hearing on the injunction. They told the judge that plaintiff's attorneys had been given a complete list of securities taken. The list did not include this \$28,000 of securities in box No. 7729, and Mr. Curtis says he did not know about the taking of these at that time. Mrs. Salzman did not disclose these in her sworn pleadings. They are not included in the injunction. It is apparent Mr. Hubbard's first knowledge of this box No. 7729 and its contents was secured from defendants' attorney in February, 1938.

The decree is based upon the theory, first, that Mrs. Salzman was an equal partner in the business with her father; second, that Mr. Hubbard wrongfully excluded her from the business; and, third, that she was wholly without fault. In our opinion the evidence will not sustain any one of these theories.

In the first place, it appears the supposed partnership was created for the sole purpose of reducing the income tax the business would be required to pay. There was no intention to create a partnership with a view to sharing profits equally. This appears from the undisputed facts that the author of the

writing was a tax expert, that no partnership books were kept nor partnership profits distributed. This also is made clear by Mrs. Salzman's own income tax return for the year 1933 (made March 15, 1934) and from her report to the Census Bureau under oath. Every circumstance in the case indicates that the partnership was fictitious. We think it also apparent that both the supposed partners knew this to be true. At least they acted as if they did. We hold there was no partnership within the meaning of Section 7 of the Uniform Partnership Act.

In the second place, assuming the existence of such a partnership, the evidence is wholly insufficient to show Mrs. Salzman was wrongfully excluded from the business. The finding of the master and the decree on this point rests wholly on the uncorroborated testimony of Mrs. Salzman, which is denied by Mr. Rubardt and negatived by the testimony of Margaret Connolly. The finding is also against inferences to be drawn from every circumstance in the case. Mrs. Salzman admits that on October 11 Mr. Rubardt went home, leaving her in possession of the premises. It is apparent she went to the office on that day in a frame of mind seeking an altercation with her father. Why else her inexcusable defense of Kester, her cry for the police, her swift movement to the deposit boxes in company of her attorney? The facts here do not justify a finding that she was excluded from the business. As a matter of fact, she excluded herself.

The key plaintiff took from his daughter on October 11 was not the door key but a key to a filing cabinet. It is true he changed the locks on the doors but not for several weeks and only after he had learned the manner in which the Salzmanns had wrongfully taken possession of his property and their attempts to wreck his business. He remained in possession of the business and managed it until July 21, 1939. During that time it prospered.

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The key plaintiff took from his daughter on October 11 was not the door key but a key to a filing cabinet. It is true he changed the locks on the doors but not for several weeks and only after he had learned the manner in which the Salzman had wrongfully taken possession of his property and their attempts to wreck his business. He remained in possession of the business and managed it until July 21, 1936. During that time it prospered.

Profits were at the rate of \$40,000 to \$50,000 per year. Notwithstanding, on July 21, 1939, unwilling apparently to abide the usual process of the courts, an order was secured depriving him of possession and appointing a trustee, directing the trustee to take control of the business "and to pay Oscar P. Rubardt and Marie Salzman each the sum of \$100.00 per week until the further order of the court". The order also directed the payment of \$15,000 to each of them out of the assets of the business.

In the third place (again assuming a partnership, which we hold did not in fact exist) Mrs. Salzman was not without fault. Her raid on the deposit boxes, the bank account, etc. came perilously near to larceny.

Upon the filing of the record in this court the defendants made a motion to dismiss that part of the appeal which asked a reversal of the decree of October 4, 1938. The motion was made on the theory that the decree was final and appealable and that no notice of appeal was given within 90 days thereafter, as required by § 76 of the Civil Practice Act. This motion was reserved to the hearing and is reargued in the briefs. Defendants say the decree of October 4, was final and appealable because it disposed of a distinct, definite and separate branch of the controversy, namely, whether there was a partnership between Mrs. Salzman and her father. Numerous cases are cited. Sebree v. Sebree, 293 Ill. 228; Suffolk v. Leiter, 261 Ill. App. 82; Wyman v. Hageman, 318 Ill. 64, 73. The issue of the partnership was raised in the case not only by plaintiff's complaint and the answer of defendants but also by defendants' counterclaim and the answer of plaintiff to it. It was essential to the case stated in the counterclaim that proof of the existence of a partnership should be made. Generally speaking, a decree is not final unless it terminates the litigation on the merits of the case, so that

Profits were at the rate of 40,000 to 50,000 per year. Notwithstanding, on July 1, 1938, unwilling apparently to admit the usual process of the courts, an order was secured depriving him of possession and appointing a trustee, directing the trustee to take control of the business "and to pay Oscar W. Salzman and Marie Salzman each the sum of \$100,000 per year until the further order of the court". The order also directed the payment of \$15,000 to each of them out of the assets of the business.

In the third phase (again assuming a partnership), which we hold did not in fact exist) Mrs. Salzman was not without fault. Her raid on the deposit boxes, the bank account, etc., came pretty closely near to larceny.

Upon the filing of the record in this court the defendants made a motion to dismiss that part of the complaint which asked a reversal of the decree of October 4, 1938. The motion was granted on the theory that the decree was final and appealable and that no notice of appeal was given within 90 days thereafter, as required by § 73 of the Civil Practice Act. This motion was reversed to the hearing and is reversed in the briefs. Defendants say the decree of October 4, was final and appealable because it disposed of a distinct, definite and separate branch of the controversy, namely, whether there was a partnership between Mrs. Salzman and her father. Numerous cases are cited, Wynn v. Wynn, 118 Ill. 64, 73. The issue of the partnership was raised in the case not only by plaintiff's complaint and the answer of defendants but also by defendants' counterclaim and the answer of plaintiff to it. It was essential to the case stated in the counterclaim that proof of the existence of a partnership should be made. Generally speaking, a decree is not final unless it terminates the litigation on the merits of the case. No that

the court below has only to proceed with the execution of its decree. Where a decree retains jurisdiction of the cause for future determination of substantial matters in controversy, or where the decree fails to fix the principles by which accounts between the parties are to be stated, and further judicial action is necessary, a decree is interlocutory.

The decree of October 4, did not end the case on the merits. There remained for consideration what were the assets of the partnership, whether these included good will and the trademarks and the real estate in which the business had been conducted, and also whether Mr. and Mrs. Salzman were justified in appropriating the cash and securities in the bank and safety deposit boxes. The finding as to the partnership really settled nothing definitely. In Gray v. Ames, 220 Ill. 251, 77 N. E. 219, the Supreme Court said: "A final decree is one which fully decides and disposes of the entire merits of the case."

To the same effect are Chechik v. Koletsky, 305 Ill. 518, 137 N. E. 419; Smith v. Bunge, 358 Ill. 229, 293 N. E. 122; Reichwein v. McCarthy, 300 Ill. App. 237, 20 N. E. 2d 814; Fyffe v. Fyffe, 292 Ill. App. 539, 11 N. E. 2d, 857; Eglin v. Glatz, 287 Ill. App. 44, 4 N. E. 2d, 259; People ex rel. Nelson v. Stony Island State Savings Bank, 355 Ill. 401, 180 N. E. 267; People v. Fisher, 335 Ill. 406, 167 N. E. 59.

The motion will be denied.

The opinion on this appeal has been unusually delayed because it was first assigned to the Second Division, where, after oral argument and at the request of parties, attempts were made at conciliation without avail. The Second Division then requested the appeal be transferred to this court and an order to that effect was entered. It was again argued orally and further briefs submitted. The record is voluminous, consisting of about 3,000

the court below has only to proceed with the execution of its decree. Where a decree retains jurisdiction of the case for future determination of substantial matters in controversy, or where the decree fails to fix the principles by which accounts between the parties are to be stated, and further judicial action is necessary, a decree is interlocutory.

The decree of October 4, did not end the case on the merits. There remained for consideration what were the assets of the partnership, whether these included good will and the trademarks and the real estate in which the business had been conducted, and also whether Mr. and Mrs. Salzman were justified in appropriating the cash and securities in the bank and safety deposit boxes. The finding as to the partnership really settled nothing definitely. In Gray v. Ames, 280 Ill. 381, 77 N. E. 219, the Supreme Court said: "A final decree is one which fully decides and disposes of the entire merits of the case."

To the same effect are Ghechik v. Kofetky, 308 Ill. 518, 137 N. E. 413; Smith v. Burns, 358 Ill. 239, 233 N. E. 132; Belofsky v. McCarthy, 300 Ill. App. 237, 20 N. E. 2d 814; Fyfe v. Fyfe, 292 Ill. App. 539, 11 N. E. 2d 827; Ellis v. Glatz, 287 Ill. App. 44, 4 N. E. 2d 359; People ex rel. Nelson v. Stony Island State Savings Bank, 355 Ill. 401, 180 N. E. 287; People v. Fisher, 335 Ill. 408, 167 N. E. 59.

The motion will be denied.

The opinion on this appeal has been unusually delayed because it was first assigned to the Second Division, where, after oral argument and at the request of parties, attempts were made at conciliation without avail. The Second Division then requested the appeal be transferred to this court and an order to that effect was entered. It was again argued orally and further briefs submitted. The record is voluminous, consisting of about 5,000

pages of testimony with about 500 exhibits.

The controlling facts, as we view them, are, however, few and practically uncontradicted. Rubardt created and developed this business. It is wholly his. Mrs. Salzman made affidavits to that effect several times after May 1, 1933. His family throughout the years have had from it maintenance and support. They have never contributed a penny to it. He may not be without faults, but this record indicates generous treatment of his wife, his children and their families. He came to have supreme confidence in Mrs. Salzman and trusted everything to her. While he was abroad the idea seems to have developed that the fictitious partnership agreement might be used as a basis of depriving him of this business and of his estate. This was begun April 28, 1936, when in his absence Mrs. Salzman placed in the exclusive control of herself and her husband \$58,000 of United States bonds purchased with his money in her own name. Having thus deprived him of his property, she wrote to him at length about his business, addressing him as "Dear Papa", expressing solicitude for his health, and sending him "kisses". Upon his return she picked a quarrel with him, taking the part of a man who had appropriated to his own use money that Mr. Rubardt had entrusted to him. She quarreled about this and made it the occasion for rifling deposit boxes, the bank account, etc. Those who should have restrained her participated in a conspiracy to take away from her father (then 70 years of age) the business which belonged to him. She did not act alone, and those who persuaded and advised her are as much at fault as she.

The decree will be reversed and the cause remanded with directions to dismiss the counterclaim for want of equity, to set aside the order dismissing the complaint, and to take an accounting of the moneys and property these defendants have wrongfully appropriated to their own use.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

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The controlling facts, as we view them, are, however,

few and practically uncontradicted. Rudardt created and developed

this business. It is wholly his. Mrs. Salzman made no contribution

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control of herself and her husband \$50,000 of United States bonds

purchased with his money in her own name. Having thus deprived

him of his property, she wrote to him at length about his past-

ness, addressing him as "Dear Papa", expressing solicitude for

his health, and sending him "kisses". Upon his return she picked

a quarrel with him, taking the part of a man who had appropriated

to his own use money that Mr. Rudardt had entrusted to him.

She quarreled about this and made it the occasion for riling

deposit boxes, the bank account, etc. Those who should have

restrained her participated in a conspiracy to take away from

her father (then 70 years of age) the business which belonged

to him. She did not act alone, and those who persuaded and ad-

vised her are as much at fault as she.

The decree will be reversed and the cause remanded with

directions to dismiss the counterclaim for want of equity, to set

aside the order dismissing the complaint, and to take an accounting

of the moneys and property these defendants have wrongfully appro-

priated to their own use.

REVEREND AND REMANDED WITH DIRECTIONS.

McNulty, P. J., and O'Connor, J., concur.

41251

OSCAR P. RUBARDT,
Appellant,

v.

MARIE RUBARDT SALZMAN and HAROLD L.
SALZMAN,

Appellees.

MARIE RUBARDT SALZMAN,
Appellee,

v.

OSCAR P. RUBARDT,
Appellant.

62
140
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

314 I.A. 189²

OPINION ON PETITION FOR REHEARING.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants reargue the case, but we are not convinced. They raise another question, presented for the first time here in their petition and not raised in the trial court. They say if the partnership agreement was executed to reduce the amount of income tax this would constitute a fraud, and that a court of equity will not relieve against it. They cite cases where the courts have refused to set aside deeds made for a fraudulent and illegal purpose. Blake v. Ogden, 223 Ill. 204; Lines v. Willey, 253 Ill. 440 at 451.

There are several answers: first, this question cannot be raised for the first time on appeal; second, while this court pointed out the evidence indicated the purpose of the proposed partnership was to reduce income tax, we did not hold the purpose to be fraudulent or that there was a wrong in that respect in which Marie and her father were pari delicto; third, if we assume the agreement was fraudulent and for a fraudulent purpose, clearly Marie, whose counterclaim is based on it, is the party who is impaled; fourth, the rule called to our attention is based on the equitable maxim that he who comes into equity must come with clean hands. The maxim has its limitations which are applicable

41321

OSCAR F. RUBART,
Appellant,

v.

MARIE RUBART and OSCAR F.
RUBART,
Appellees.

Appellees.

MARIE RUBART and OSCAR F.
RUBART,
Appellees,

v.

OSCAR F. RUBART,
Appellant.

OPINION ON PETITION FOR REHEARING.

MR. JUSTICE KATZMAN DELIVERED THE OPINION OF THE COURT.

Defendants argue the case, but we are not convinced.

They raise another question, presented for the first time here in their petition and not raised in the trial court. They say

if the partnership agreement was executed to reduce the amount of income tax this would constitute a fraud, and that a court of equity will not relieve against it. They cite cases where

the courts have refused to set aside deeds made for a fraudulent and illegal purpose. Wicks v. Wicks, 203 Ill. 204; Ill. v.

Ill. v. Wicks, 203 Ill. 440 at 451.

There are several answers: first, this question cannot

be raised for the first time on appeal; second, while this court pointed out the evidence indicated the purpose of the proposed

partnership was to reduce income tax, we did not hold the purpose to be fraudulent or that there was a wrong in that respect in

which Marie and her father were guilty; third, if we assume the agreement was fraudulent and for a fraudulent purpose, clearly

Marie, whose complaint is based on it, is the party who is

impaled; fourth, the rule called to our attention is based on

the equitable maxim that he who comes into equity must do so with clean hands. The maxim has its limitations which are well known

here.

In Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 1, §399, quoted by this court in American University v. Wood, 216 Ill. App. 189, affirmed by the Supreme Court in 294 Ill. 196, it was said:

" * * * It does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands."

The subject matter of this controversy concerns the ownership of this business. Mrs. Salzman's claims are not materially affected by the admitted fact that she padded the payrolls for a fraudulent purpose. Rubardt's title to these assets does not in any way depend upon any wrongful conduct on his part. The property is his because he bought and paid for it and the business is his because he created it by his industry. He has not conveyed to any other. The petition for rehearing will be denied.

PETITION DENIED.

here.

In Pomeroy's Equity Jurisprudence, 4th ed., Vol. I, §399, quoted by this court in American University v. Wood, 218 Ill. App. 189, affirmed by the Supreme Court in 294 Ill. 109, it was said:

" * * * It does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands."

The subject-matter of this controversy concerns the ownership of this business. Mrs. Salzman's claims are not materially affected by the admitted fact that she held the payroll for a fraudulent purpose. Lubart's title to these assets does not in any way depend upon any wrongful conduct on his part. The property is his because he bought and paid for it and the business is his because he created it by his industry. He has not conveyed to any other. The petition for renealing will be denied.

PETITION DENIED.

41820

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellee,

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Defendants.

63
APPEAL FROM

SUPERIOR COURT

COOK COUNTY. 141

On Appeal of CHARLES GOERLITZ,
Appellant.

314 I.A. 189³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Goerlitz from a judgment of \$10,000 entered against him, impleaded with his mother, Grace E. Goerlitz. The action was brought by the administrator, under the statute, for alleged negligence in driving an automobile, said to have been the cause of the death of the intestate. A complaint was filed on November 22, 1940, summons was served and the default of both defendants entered. The cause was submitted to a jury, and on an ex parte trial the verdict was rendered with judgment as heretofore stated.

Our decision in this case is controlled by our opinion in General No. 41939, in which an opinion has been this day filed. More than 30 days after the entry of the judgment in this case, both defendants filed a motion in the nature of a writ of error coram nobis under §72 of the Civil Practice Act. The plaintiff answered, evidence was taken and the court entered an order setting aside the judgment as to Grace E. Goerlitz but denying the motion as to Charles Goerlitz. The appeal in 41939 was by Charles Goerlitz from that order, and this appeal is by Charles Goerlitz from the judgment that was rendered on the verdict of the jury.

Upon the trial of the case it appears that uncontradicted evidence was given to the effect that Charles Goerlitz, at the time of the accident in which deceased was injured, when the suit

JAY W. RAPP, Administrator of the
Estate of George Tonn, Deceased,
Appellee,

v.

GRACE E. GOERTLITZ and CHARLES GOERTLITZ,
Defendants.

IN SENIOR COURT,
COOK COUNTY,

On Appeal of CHARLES GOERTLITZ,
Appellant.

MR. JUSTICE B. T. DELANEY delivered the opinion of the court.

This is an appeal by Charles Goertlitz from a judgment of 10,000 entered against him, implicated with his mother, Grace E. Goertlitz. The action was brought by the administrator, under the statute, for alleged negligence in driving an automobile, said to have been the cause of the death of the intestate. A complaint was filed on November 22, 1940, wherein was set out and the default of both defendants entered. The cause was submitted to a jury, and on an ex parte trial the verdict was rendered with judgment as heretofore stated.

Our decision in this case is controlled by our opinion in General No. 41329, in which an opinion has been this day filed, more than 30 days after the entry of the judgment in this case, both defendants filed a motion in the nature of a writ of error coram nobis under §25 of the Civil Practice Act. The plaintiff answered, evidence was taken and the court entered an order setting aside the judgment as to Grace E. Goertlitz but denying the motion as to Charles Goertlitz. The appeal in 41329 was by Charles Goertlitz from that order, and this appeal is by Charles Goertlitz from the judgment that was rendered on the verdict of the jury.

Upon the trial of the case it appears that uncontradicted evidence was given to the effect that Charles Goertlitz, at the time of the accident in which deceased was injured, when the exit

was begun, and at the time of the trial and entry of judgment, was a minor 19 years of age. On the authority of Peak v. Shasted, 21 Ill. 137, and other cases cited in that opinion, it was reversible error for the court to proceed to judgment without appointing a guardian ad litem to defend the minor. For that error the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

was begun, and at the time of the trial and entry of judgment, was a minor 19 years of age. On the authority of Peck v. Shattuck, 21 Ill. 137, and other cases cited in that opinion, it was reversible error for the court to proceed to judgment without appointing a guardian ad litem to defend the minor. For that error the judgment will be reversed and the cause remanded for another trial.

REVEREND AND ADVANCED.

McGuire, P. J., and O'Connor, J., concur.

41842

BERNICE HILGER, as Administratrix of the
Estate of Peter Hilger, Deceased, and
OLLIE DE ANGELO,

Appellees,

v.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,

Appellant.

ROSE HILGER, as Administratrix of the
Estate of Martin Hilger, Deceased,
Appellee

v.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

314 I.A. 190

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

April 3, 1938, Martin Hilger was digging a well on a lot purchased by him in a subdivision just north of Melrose Park in Cook County. The lot fronted on 19th Avenue, was 143.19 feet in depth and on its rear abutted another lot (No. 61) which fronted on 18th Avenue. Peter Hilger and Ollie DeAngelo were helping Martin Hilger dig the well. At the rear of the lots in this subdivision was a 20 foot strip of land dedicated as an easement for public utilities, and in the center of this strip defendant Public Service Company had erected its system for distributing electricity to its customers through transmission lines. In digging the well Peter Hilger used a metal drill or auger about eight inches in diameter and 3 feet long to which, from time to time as the work progressed, were attached pieces of galvanized pipe about 10 feet long. The well was down about 33 feet and the auger with sections of pipe attached to it had become about 33 feet long. This pipe came in contact with defendant's wires. Martin and Peter Hilger were instantly electrocuted. Their widows were appointed to administer their respective estates,

BERNICE HILGER, as Administratrix of the
Estate of Peter Hilger, Deceased, and
OLLIE DE ANGELO,
Appellees,

v.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY,

ROSE HILGER, as Administratrix of the
Estate of Martin Hilger, Deceased,
Appellee

v.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,
Appellant.

3141A.190

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

April 3, 1936, Martin Hilger was digging a well on a

lot purchased by him in a subdivision just north of Melrose Park
in Cook County. The lot fronted on 18th Avenue, was 142.19 feet
in depth and on its rear abutted another lot (No. 61) which
fronted on 18th Avenue. Peter Hilger and Ollie DeAngelo were
helping Martin Hilger dig the well. At the rear of the lots
in this subdivision was a 30 foot strip of land dedicated as an
easement for public utilities, and in the center of this strip
defendant Public Service Company had erected its system for
distributing electricity to its customers through transmission
lines. In digging the well Peter Hilger used a metal drill or
auger about eight inches in diameter and 5 feet long to which
from time to time as the work progressed, were attached pieces
of galvanized pipe about 10 feet long. The well was down about
33 feet and the auger with sections of pipe attached to it had
become about 33 feet long. This pipe came in contact with defend-
ant's wires. Martin and Peter Hilger were instantly electrocuted.
Their wives were appointed to administer their respective estates.

and each brought suit against defendant under the statute. Ollie DeAngelo was severely injured at the same time and also brought suit against defendant, charging negligence. The cases were tried together and verdicts entered in favor of the three plaintiffs. Each of the estates of those who died was allowed \$10,000, and DeAngelo \$400. Judgments were entered in favor of each plaintiff on these separate verdicts. Defendant appeals.

It is contended for reversal that an instruction for defendant requested at the close of all the evidence should in each case have been given; that the persons injured were not in the exercise of due care; that a new trial should have been given because the verdicts were against the manifest weight of the evidence, and because of errors in the ruling of the court on the admission of evidence as well as for erroneous instructions given at the request of plaintiffs.

The physical facts, established, we think, by a preponderance of the evidence, are that the well was being dug 5 feet and 6 inches west of the strip of land occupied by the public utility. The posts upon which defendant's wires were strung were set in the center of the strip. The distance from the well to a point directly under the nearest power line was 15 feet and 6 inches by actual measurements. On each of the poles were two cross-arms. Two wires were on the top of the top cross-arm. One of these was a primary wire carrying 2300 volts of electricity. The other was a neutral wire. Three wires were attached to the lower cross-arm. These carried 115 to 120 volts of electricity to the ground. The distance between the poles next north and south of the place where the accident occurred was by actual measurement 240 feet. The accident happened about midway between these two poles. The poles were 30 feet long and set in the ground about 5 feet from the surface. The wires on the top cross-

and each brought suit against defendant under the statute. DeAngelo was severely injured at the same time and also brought suit against defendant, charging negligence. The cases were tried together and verdicts entered in favor of the three plaintiffs. Each of the estates of those who died was allowed \$10,000, and DeAngelo \$400. Judgments were entered in favor of each plaintiff on these separate verdicts. Defendant appeals.

It is contended for reversal that an instruction for defendant requested at the close of all the evidence should in each case have been given; that the persons injured were not in the exercise of due care; that a new trial should have been given because the verdicts were against the manifest weight of the evidence, and because of error in the ruling of the court on the admission of evidence as well as for erroneous instructions given at the request of plaintiffs.

The physical facts, established, we think, by a preponderance of the evidence, are that the well was 6 feet and 6 inches west of the strip of land occupied by the public utility. The posts upon which defendant's wires were strung were set in the center of the strip. The distance from the well to a point directly under the nearest power line was 15 feet and 6 inches by actual measurements. On each of the poles were two cross-arms. Two wires were on the top of the top cross-arm. One of these was a primary wire carrying 3000 volts of electricity. The other was a neutral wire. Three wires were attached to the lower cross-arm. These carried 115 to 120 volts of electricity to the ground. The distance between the poles next north and south of the place where the accident occurred was by actual measurement 840 feet. The accident happened about midway between these two poles. The poles were 30 feet long and set in the ground about 5 feet from the surface. The wires on the top cross-

arms of the poles were 24 feet and 5 inches above the ground. The wires on the lower cross-arms at the poles were 22 feet and 5 inches above the ground. The point of lowest sag of the wires on the lower cross-arm was 18 feet and 3 inches above the ground. The point of lowest sag of the wires on the top cross-arms was 19 feet and 10 inches above the ground.

The auger was operated by turning it around by hand using a pipe wrench. As the depth of the well increased pieces of galvanized pipe were attached to the auger. The driller had pieces of galvanized pipe 6 inches in diameter and about 10 feet long. After the auger was sunk 2 or 3 feet, the method used was to screw on to the auger one of these pieces of pipe. When the well had been sunk to a depth of 10 feet another piece of 10 foot pipe was attached. The diggers had with them five pieces of such pipe, each 10 feet in length. Their method of drilling was to screw the auger into the ground, then pull it out and clean the dirt out of it. The three men started to work about 10 or 10:30 o'clock in the morning of April 3, 1938. They began by constructing a foundation for a building on space measured off on the lot and dug a trench about the space 18 inches deep and about 22 square feet of ground. Then they began to dig the well, quit for lunch, returned in the afternoon and continued to work at the well until the accident happened.

This subdivision was laid out in 1935. Defendant's transmission lines were completed in 1937. There was no insulation covering the wires. There were no signs warning persons working about any danger from the wires.

DeAngelo testified the weather was windy and cold that day. He says that after drilling down 3 feet they connected a 10 foot pipe to the auger. He says he was holding the pipe straight up while Martin and "Pete" bent down and turned it all

arms of the poles were 4 feet and 6 inches above the ground. The wires on the lower cross-arms at the poles were 12 feet and 5 inches above the ground. The point of least sag of the wire on the lower cross-arm was 18 feet and 3 inches above the ground. The point of least sag of the wire on the top cross-arm was 19 feet and 10 inches above the ground.

The auger was operated by turning it around by hand using a pipe wrench. As the depth of the well increased pieces of galvanized pipe were attached to the auger. The drillers had pieces of galvanized pipe 6 inches in diameter and about 10 feet long. After the auger was sunk 2 or 3 feet, the method used was to screw on to the auger one of these pieces of pipe. When the well had been sunk to a depth of 10 feet another piece of 10 foot pipe was attached. The diggers had with them five pieces of such pipe, each 10 feet in length. Their method of drilling was to screw the auger into the ground, then pull it out and clean the dirt out of it. The three men started to work about 10 or 10:30 o'clock in the morning of April 3, 1938. They began by constructing a foundation for a building on space reserved off on the lot and dug a trench about the size 15 inches deep and about 22 square feet of ground. Then they began to dig the well, quit for lunch, returned in the afternoon and continued to work at the well until the accident happened.

This subdivision was laid out in 1935. Defendant's transmission lines were completed in 1937. There was no insulation covering the wires. There were no signs warning persons working about any danger from the wires. Defendant testified the weather was windy and cold that day. He says that after drilling down 3 feet they connected a 10 foot pipe to the auger. He says he was holding the pipe straight up while Martin and "Fete" bent down and turned it all

around, and that after they got the drill down to where they used up the first 10 feet of pipe they put on another 10 feet of the same pipe. He says that at the time of the accident they pulled out the pipe; that "I was holding the pipe straight and they pulled out on the pipe and I heard some kind of noise, I don't know what you call it, some noise from the top, and they all fell, the whole 3 of them. All 3 of us fell down. At the time I heard the noise I held the pipe straight. The pipe was not curved, it was a straight pipe. The hole was about 6 inches wide [apparently diameter]. We had two sections of this 10 foot pipe on the drill and 3 left on the ground. The 2 pipes 20 feet and there was about 3-1/2 about 23 or 24 feet. This noise I heard was on the top. At one time the wire sizzled like that, I can't explain it any better. On that day I had on shoes with rubber soles. * * * After the sizzling I woke up again and saw the sun shining. I don't know how long I was laying down there. I saw Peter and Martin laying on the ground there. I didn't see the pipe. Oh, yes, the pipe was laying down there. The pipe was laying down and falling on top of the body there. I mean on top of Martin."

By actual measurements the sag on the top wire was 4 feet and 7 inches, and this was the wire which carried 2300 volts. It was the only wire which carried a load sufficient to have caused the death of these men. The cross-arm on the poles was 5 feet and 7 inches long. The wire closest to the property on which the well was being dug was more than 7 feet inside the easement of the utilities company. The well was some distance from the west boundary line of the easement. The maximum sag in the primary wire was 4 feet and 7 inches. The maximum sway in this wire physically possible would be until it was on the same horizontal plane as the cross-arm. At the maximum sway of the

around, and that after they got the drill down to where they used up the first 10 feet of pipe they put on another 10 feet of the same pipe. We say that at the time of the accident they pulled out the pipe; that I was holding the pipe straight and they pulled out on the pipe and I heard some kind of noise, I don't know what you call it, some noise from the top, and they all fell, the whole 3 of them. All 3 of us fell down. At the time I heard the noise I held the pipe straight. The pipe was not curved, it was a straight pipe. The hole was about 6 inches wide [apparently diameter]. We had two sections of this 10 foot pipe on the drill and 3 left on the ground. The 3 pipes 10 feet and there was about 3-1/2 about 25 or 24 feet. This noise I heard was on the top. At one time the wire started like that, I can't explain it any better. On that day I was on a sack with rubber soles. * * * after the falling I came up again and saw the sun shining. I don't know how long I was laying down there, I saw Peter and Martin laying on the ground there, I didn't see the pipe. Oh, yes, the pipe was laying down there. The pipe was laying down and falling on top of the body there. I mean on top of Martin."

By actual measurements the sag on the top wire was 4 feet and 7 inches, and this was the wire which carried 2500 volts. It was the only wire which carried a load sufficient to have caused the death of these men. The cross-arm on the pole was 5 feet and 7 inches long. The wire closest to the property on which the cell was being dug was more than 7 feet inside the easement of the utilities company. The cell was some distance from the west boundary line of the easement. The maximum sag in the primary wire was 4 feet and 7 inches. The maximum sag in this wire physically possible would be until it was on the same horizontal plane as the cross-rod. At the maximum sag of the

wire it would be still more than 2 feet east of the west line of the easement. The average velocity of the wind on this day was 13.7 miles per hour, and there was a momentary velocity of 40 miles per hour for a time, the wind blowing from the southwest. The southwest wind would tend to carry the wire away from instead of toward the well. The distance from the well to a point directly underneath the nearest wire was 15 feet and 6 inches. The well at the time the accident occurred was at a depth of 23 feet and 3 inches. The total length of the pipe attached as it was to the auger was 31 feet by actual measurement.

As we have already stated, none of the wires were insulated and no warning signs of any kind were placed in that vicinity. We hold, however, there was nothing in the situation such as would cast on the defendant company the duty of giving warning, as was the case in Merlo v. Public Service Company, et al., 313 Ill. App. 57, 38 N.E. 2d, 986. ~~There the proof showed that~~ There the proof showed that the Public Service Company had actual notice of the work being done and of its dangerous character. In this case the defendant had no reason to suppose the well was being dug on Mr. Hilger's lot, or knowledge of the manner in which it was being dug.

The physical facts (as the same appear from actual measurements) are such as to leave little doubt of the way this accident occurred. It is true numerous witnesses for plaintiffs gave evidence as to the physical situation with reference to the transmission wires and the well from which it might be inferred that the line swayed over and came in contact with the auger and pipe attached to it, which were straight up, but their opinions were mere estimates made some three years after the accident in question occurred. As against undisputed actual measurements evidence of this kind (while admissible) would have little weight. In Louthan v. Chicago City Ry. Co., 198 Ill. App. 329 at 333, we

wire it would be still more than 2 feet east of the west line of the easement. The average velocity of the wind at this city was 13.7 miles per hour, and there was a momentary velocity of 40 miles per hour for a time, the wind blowing from the south-west. The southwest wind would tend to carry the wire away from instead of toward the well. The distance from the well to a point directly underneath the nearest wire was 15 feet and 6 inches. The well at the time the accident occurred was at a depth of 23 feet and 3 inches. The total length of the pipe attached as it was to the sugar was 21 feet by actual measurement. As we have already stated, none of the wires were insulated and no warning signs of any kind were placed in that vicinity. We hold, however, there was nothing in the situation such as would cast on the defendant company the duty of giving warning, as was the case in Merlo v. Public Service Company, 313 Ill. App. 57, 38 N.E.2d 986. There the proof showed that the Public Service Company had actual notice of the work being done and of its dangerous character. In this case the defendant had no reason to suppose the well was being dug on Mr. Hilger's lot, or knowledge of the manner in which it was being dug. The physical facts (as the same appear from actual measurements) are such as to leave little doubt of the way this accident occurred. It is true numerous witnesses for plaintiff gave evidence as to the physical situation with reference to the transmission wires and the well from which it might be inferred that the line swayed over and came in contact with the sugar and pipe attached to it, which were straight up, but their opinions were not estimates made some three years after the accident in question occurred. As a final undisputed actual measurement evidence of this kind (while admissible) would have little weight. In London v. Chicago City Ry. Co., 188 Ill. App. 323 at 325, we

said such evidence was "Exceedingly inaccurate and very unreliable".

We deem it unnecessary to discuss the questions raised as to the different respects in which it is urged the jury might have found defendant guilty of negligence. It was essential to the case of each plaintiff that it should be proved the party injured at the time of the accident was in the exercise of due care for his own safety. In the face of absolutely certain evidence, which compels, as it seems to us, the conclusion that as the well became deeper the diggers attached pieces of pipe to the auger making it of dangerous length, we are persuaded that contact with this dangerous wire was made only by permitting the pipe attached to the auger to fall over and upon the wire.

Under the law as stated by the court, it was necessary, in order that plaintiffs might recover, that the jury should find they were at the time they were injured in the exercise of reasonable care. The jury must have so found, but their verdicts, for the reason just stated, are against the evidence. For that reason a new trial should have been granted. For the error in denying that motion the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Mc Surely, P. J., and O'Connor, J., concur.

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able".

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as to the different respects in which it is urged the jury might

have found defendant guilty of negligence. It was essential
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evidence, which compels, as it seems to us, the conclusion that

as the well became deeper the diggers attached pieces of pipe

to the auger making it of dangerous length, we are persuaded

that contact with this dangerous wire was made only by connecting

the pipe attached to the auger to fall over and upon the wire.

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the reason just stated, are against the evidence. For that

reason a new trial should have been granted. For the error in

denying that motion the judgment will be reversed and the cause

remanded.

REVEREND AND HONORABLE,

Mr. Justice, F. J., and O'Connor, J., dissent.

41873

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellant,

V.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

314 I.A. 191

This appeal is from the same order we reversed in part in No. 41939, opinion filed this day. Defendants (mother and son) were sued by the administrator to recover damages under the statute for alleged negligence on September 19, 1940, from which the deceased received the injuries from which he died. The first count of the complaint charged negligence; the second wilful, wanton and malicious conduct. Summons was served on both defendants December 13, 1940; their defaults entered January 9, 1941. On January 17 there was a trial, defendants not appearing. There was a verdict of guilty as to both with damages assessed at \$10,000.00, and judgment.

March 10, 1941, defendants filed a motion in the nature of writ of error coram nobis under §72 of the Civil Practice Act. They moved the judgment be set aside and a new trial granted. The ground of the motion as to Charles was that he was a minor. The motion as to him was denied. The ground of the motion as to Grace E. Goerlitz was an excusable mistake on her part through which she failed to appear and interpose her defense. The plaintiff made a motion to strike defendants' motion under §72 and the affidavits supporting it. The court, however, considered the motions and also heard oral evidence with the result stated. This particular appeal is by plaintiff from that part of the order which set aside the judgment as to Grace E. Goerlitz.

The plaintiff contends (citing a number of well known authorities, such as Marabia v. Mary Thompson Hospital, 309 Ill.

JAY M. RAPP, Administrator of the
Estate of George Torg, deceased,
Appellant,

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Appellees.

APPEAL FROM

UPPER MERIDIAN

COURT REPORT.

MR. JUSTICE MATHIAS DELIVERED THE DECISION.

3141411

This appeal is from the same order we reversed in last

in No. 41859, opinion filed this day. Defendants (mother and son) were sued by the administrator to recover damages under the statute for alleged negligence on September 19, 1940, from which the deceased received the injuries from which he died. The first count of the complaint charged negligence; the second willful, wanton and malicious conduct. Damages were served on both defendants December 13, 1940; their defaults entered January 9, 1941. On January 17 there was a trial, defendants not appearing. There was a verdict of guilty as to both with damages assessed at \$10,000.00, and judgment.

March 10, 1941, defendants filed a motion in the nature

of writ of error coram nobis under §73 of the Civil Practice Act. They moved the judgment be set aside and a new trial granted. The ground of the motion as to Charles was that he was a minor. The motion as to him was denied. The ground of the motion as to Grace E. Goerlitz was an erroneous mistake on her part through which she failed to appear and introduce her defense. The plaintiff made a motion to strike defendants' motion under §73 and the affidavits supporting it. The court, however, considered the motions and also heard oral evidence with the result stated. This particular appeal is by plaintiff from that part of the order which set aside the judgment as to Grace E. Goerlitz. The plaintiff contends (citing a number of well known authorities, such as Barbie v. Barry Thompson Goerlitz, 20 Ill.

147; Chapman v. North American Ins. Co., 292 Ill. 179; Linehan v. Travelers Ins. Co., 370 Ill. 157; Cramer v. Illinois Commercial Men's Ass'n., 260 Ill. 516) that ordinarily a court is without power, after the expiration of the term, to set aside a final judgment; that the motion in the nature of a writ of error coram nobis is not intended to relieve a party from the consequences of his own negligence, and the writ does not lie to review an error or mistake of the court in point of law but must concern some error of fact, not of record, which if known to the court would have prevented the entry of the judgment. Generally speaking, the cases cited sustain these rules.

The facts disclosed to the court by the affidavits and the evidence taken are that Mrs. Goerlitz at the time of the accident in question, was operating a restaurant at 1148 Wells Street in Chicago, and that she owned an automobile which, at the time of the accident in which Mr. Tong lost his life, was being driven by her son 19 years of age. Suit was brought against mother and son, and summons was served by leaving copies thereof with Mrs. Goerlitz. She had in her employ in the restaurant a cook (Jack Kalles) whom she had known for about three years. When she received copies of summons she handed the papers to Kalles and told him to go to the office of Chadwick, Johnson & Leone, attorneys for the plaintiff, and "see what it was all about". She did not receive the papers back, but Kalles returned on the same day and told her that he had a conversation with Mr. Chadwick of plaintiff's firm, and that Mr. Chadwick had told him that he would not file any suit until he saw Mrs. Goerlitz. She admits that she did not go to see Mr. Chadwick after that and never saw or talked with him. She says she was going to do so, but he never called her and she was busy. She could read English, knew she was being sued for \$10,000, knew that her son

147; Chapman v. North American Ins. Co., 202 Ill. 17; Linahan
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would have prevented the entry of the judgment. Generally speak-
ing, the cases cited sustain these rules.

The facts disclosed to the court by the affidavits and
the evidence taken are that Mrs. Goeltz at the time of the
accident in question, was operating a restaurant at 119 1/2
Street in Chicago, and that she owned an automobile which, at
the time of the accident in which Mr. Tong lost his life, was
being driven by her son 19 years of age. But was brought against
mother and son, and summons was served by leaving copies thereof
with Mrs. Goeltz. She had in her employ in the restaurant a
cook (Jack Kallee) whom she had known for about three years.
When she received copies of summons she handed the papers to
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Leone, attorneys for the plaintiff, and "see what it was all
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and never saw or talked with him. She says she was going to do
so, but he never called her and she was busy. She could read
English, knew she was being sued for \$10,000, knew that her son

had an accident in which a person had been killed, and at a Coroner's inquest which was held after the death of Mr. Tong, she was represented by her attorney, Mr. Chones. She also attended the inquest herself. She never told Kalles to talk to Chones or to go over and see whether he could make a settlement. She never asked Mr. Chones to represent her in seeing whether she could make a settlement. She did not go to see Mr. Chones until February 24, which was after the judgment had been entered.

Kalles testified that he took the copies of the summons to Mr. Chadwick's office and talked with him about it. The result of their talk was that Mr. Chadwick said he was not going to file any suit until Kalles would bring Mrs. Goerlitz in after the holidays to his office to see if they could come to some kind of settlement. Kalles says that he left the office and left the summons there with Chadwick. He also says that Chadwick called him up afterwards and asked when he was going to bring Mrs. Goerlitz to the office, and he said he would try and bring her in as soon as he could. Kalles says he does not remember whether Chadwick asked him to leave the summons there, but he left the papers with him on the desk. He says that Chadwick said he was not going any farther, that he would wait "until you bring Mrs. Goerlitz to this office". Kalles says that when he left the lawyer's office he came back, but he does not remember what for. He denies that he forgot any papers, says he didn't come back to pick them up from Mr. Chadwick's desk, and that he did not come back and say that he had forgotten his papers. He says he can't tell what he came back for. He says that he never went back to the lawyer's office, but that he told Mrs. Goerlitz she would have to go down there to try and negotiate a settlement with him. The son Charles was not present at any of these conversations, and Kalles never

had an accident in which a person had been killed, and at a
Coroner's inquest which was held after the death of Mr. Jones,
she was represented by her attorney, Mr. Chones. She also
attended the inquest herself. She never told Kallies to talk
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office, but that he told Mrs. Goerlitz she would have to go down
there to try and negotiate a settlement with him. The son Charles
was not present at any of these conversations, and Kallies never

talked with Mr. Chones, the attorney, about having been to the lawyer's office, although he knew Chones had represented Mrs. Goerlitz at the Coroner's inquest. He says he told her that she was expected to go down to see Chadwick some time after the holidays. He did not know whether she did so or not.

Mr. Chadwick testified Kalles was a stranger to him; came to his office, said that while he was not a lawyer he came to see about the Goerlitz suit. Chadwick talked with him a few minutes about the suit, gave him the particulars and suggested a conference between himself and the lawyer representing Mrs. Goerlitz. He also suggested that one of the Tong boys and Mr. Rapp, the administrator of the estate, might be at the conference. He says he talked with Kalles about forty minutes. Mr. Chadwick said he did not ask Mr. Kalles to leave the summons with him, and he did not do so. He says, however, that after leaving the office Kalles came back, said he had forgotten his papers, picked up the summons from the desk and took it away with him. Chadwick knew that Mr. Chones was the attorney at the inquest, and Mr. Leone of his office got in touch with Chones with reference to a settlement. He says that he suggested Mr. Chones be called into a conference. Whether Mr. Chones was called up he does not know, but he had not told anybody to call him. He says that he afterwards went to Mrs. Goerlitz' house to see her but she wouldn't answer the bell. He saw her on the back porch.

Mrs. Chadwick, who acted as secretary to her husband, testified that Kalles was at the office at the time in question and asked to see Mr. Chadwick; that she ushered him in; that he stayed a considerable time; that after he came out he came back and said he had forgotten his papers, and she told him he might go into Mr. Chadwick's room again. She saw him come out and he had a yellow piece of paper in his hand. Mrs. Chadwick's testimony is corroborated by that of Miss Vollriede, a stenographer

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and receptionist in the lawyer's office.

The affidavit of Mrs. Goerlitz states that she understood no suit or action had been taken and not receiving the summons back she relied upon the representations reported by Kalles and did not file any appearance or answer in the cause; that she did not know she was to see Mr. Chadwick at any particular time and believed no further action would be taken until the matter was discussed; that, as a matter of fact, she afterwards employed Mr. Chones on February 24, 1941, and he reported back to her that judgment by default had been entered against her for \$10,000.

There has been in recent years quite a development of the law in relation to motions in the nature of a writ of error coram nobis. In People v. Green, 355 Ill. 468, the Supreme Court said that among other reasons which would justify the issuance of the writ was "where by some excusable mistake or ignorance of the accused, or without negligence on his part, he has been deprived of a defense which he could have used at his trial, and which, if known by the court, would have prevented a conviction". In so far as Mrs. Goerlitz is concerned this would seem to be the only ground upon which her motion may be justified. It is apparent from the remarks of the trial judge that he was persuaded to the ruling he made largely by the fact that the evidence taken and the affidavits filed by all the parties convinced him a judgment for \$10,000 had been entered against Mrs. Goerlitz when she was not liable at all. Courts are reluctant to permit judgments of that kind to stand, and the question of whether Mrs. Goerlitz was negligent depends very much upon her own knowledge of language, customs, etc. For a business man with some knowledge of the practice of the courts her conduct could hardly be said to be excusable. For a woman without such knowledge to rely upon

and receptionist in a lawyer's office.

The affidavit of Mrs. Goerlitz states that she under-

stood no suit or action had been taken and not receiving the summons back she relied upon the representations reported by Kallie and did not file any appearance or answer in the case; that she did not know she was to see Mr. Gundersen at any particular time and believed no further action would be taken until the matter was discussed; that, as a matter of fact, she afterwards employed Mr. Gundersen on February 24, 1941, and he reported back to her that judgment by default had been entered against her for \$10,000.

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representations made to her is different.

Defendant makes much of the fact Mr. Chadwick testified in a case in which he was also attorney, but the circumstances were unusual and no other had the knowledge which Mr. Chadwick possessed. The evidence does not justify an inference that Mrs. Goerlitz was intentionally deceived. The trial court was apparently of the opinion that Mrs. Goerlitz had been misled and that through excusable mistake or ignorance she relied upon the conversation reported to her by Kalles and so failed to interpose her defense. The trial court saw the parties and had a better opportunity to decide that question than a court of review. In a matter of this kind it is usual to follow the ruling which will give every party their day in court. The line between excusable mistake and negligence is difficult to determine.

Defendant cites many cases from this and other states where a judgment has been vacated under circumstances quite similar to those here appearing. State Board of Agriculture v. Meyers, 13 Colo. App. 500, 58 Pac. 879; Elliott v. Quinn, 40 Colo. 328, 90 Pac. 607; Council Bluffs Loan & T. Co. v. Jennings, 81 Iowa 470, 46 N. W. 1006; Putnam v. Murphy, 53 Ill. 404, distinguished in Precision Products Co. v. Gady, 233 Ill. App. 77. The order will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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in a case in which he was also attorney, but the circumstances were unusual and no other had the knowledge which Mr. Defendant possessed. The evidence does not justify an inference that Mr. Goetz was intentionally deceived. The trial court was apparently of the opinion that Mr. Goetz had been misled and that through exorable mistake or ignorance she relied upon the conversation reported to her by Kates and so failed to interrogate her defense. The trial court saw the parties and had a full opportunity to decide that question than a court of review. In a matter of this kind it is usual to follow the ruling which will give every party their day in court. The line between gross mistake and negligence is difficult to determine.

Defendant cites many cases from this and other states where a judgment has been vacated under circumstances quite similar to those here appearing. State Board of Agriculture v. Meyers, 18 Colo. App. 500, 88 Pac. 879; Wills v. Wills, 40 Colo. 388, 90 Pac. 807; Council Bluffs Loan & T. Co. v. Jennings, 81 Iowa 470, 43 N. W. 1006; Putnam v. Putnam, 53 Ill. 404, distinguished in Prosser Products Co. v. Gedy, 223 Ill. App. 77. The order will be affirmed.

AFFIRMED.

McNulty, J., and O'Connor, J., concur.

41939

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellee,

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Defendants.

66
APPEAL FROM

SUPERIOR COURT,
COOK COUNTY. 144

On Appeal of CHARLES GOERLITZ,
Appellant.

314 I.A. 191²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Goerlitz, one of two defendants in an action brought by the administrator of the estate of George Tong to recover damages for the benefit of the next of kin on account of alleged negligence of Charles Goerlitz in driving an automobile on September 19, 1940, averred to have been the cause of the death of the intestate. Plaintiff filed with his complaint a demand for trial by jury. Summons was served on both defendants December 13, 1940. An order was entered January 9, 1941, defaulting both defendants and setting the cause for January 17, 1941. Upon the hearing, defendants not further appearing, the evidence was taken and a motion by plaintiff to instruct the jury to return a verdict for the plaintiff and assess damages at not to exceed the sum of \$10,000 was given by the court. The verdict was returned and damages assessed at the full amount of the demand (\$10,000) and the court entered judgment on the verdict.

March 10, 1941, the defendants filed a motion in the nature of a writ of error coram nobis under §72 of the Practice Act (Smith-Hurd's Anno. Stat., Chap. 110, par. 196, p. 782) to vacate and set aside the order of default and grant leave to the defendants to plead or answer the complaint. In support of this motion defendant Charles Goerlitz set forth that during the month

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellee,

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Defendants.

On Appeal of CHARLES GOERLITZ,
Appellant.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Goerlitz, one of two

defendants in an action brought by the administrator of the estate of George Tong to recover damages for the benefit of the next of kin on account of alleged negligence of Charles Goerlitz in driving an automobile on September 19, 1940, averred to have been the cause of the death of the intestate. Plaintiff filed with his complaint a demand for trial by jury. Summons was served on both defendants December 15, 1940. An order was entered January 8, 1941, defaulting both defendants and setting the cause for January 17, 1941. Upon the hearing, defendants not further appearing, the evidence was taken and a motion by plaintiff to instruct the jury to return a verdict for the plaintiff and assess damages at not to exceed the sum of 10,000 was given by the court. The verdict was returned and damages assessed at the full amount of the demand (10,000) and the court entered judgment on the verdict.

March 10, 1941, the defendants filed a motion in the nature of a writ of error coram nobis under §78 of the Practice Act (Smith-Burd's Anno. Stat., Chap. 110, par. 196, p. 782) to vacate and set aside the order of default and grant leave to the defendants to plead or answer the complaint. In support of this motion defendant Charles Goerlitz set forth that during the month

SUPERIOR COURT,
COOK COUNTY.

APRIL TERM

3141A191

of January, 1941, and at the time of making the affidavit, he was a minor of the age of 19 years, and that no guardian had been appointed for him. He also set up that he did not know any suit was pending against him and learned shortly after February 24, 1941, that the judgment had been entered against him on January 17 for \$10,000. His affidavit averred that he had a good defense to the cause of action, specifying that he was not negligent in the manner alleged in the complaint; that the deceased was not in the exercise of due care, and that he (defendant) did not act wilfully, wantonly or maliciously, as alleged in one of the counts of the complaint. A rule was entered on the plaintiff to answer the written motion within 5 days. The motion was heard by the court upon the motion of the plaintiff to strike the motion in the nature of the writ of error coram nobis and upon affidavits and testimony received in open court. An order was entered sustaining the motion as to the defendant, Grace E. Goerlitz, and vacating the judgment as to her, but as to the defendant, Charles Goerlitz, the motion was denied and an order entered that the judgment theretofore entered against him stand.

The motion to strike admitted, and, at any rate, the undisputed evidence taken showed, that Charles Goerlitz was a minor 19 years of age at the time the accident occurred in which Mr. Tong received injuries which resulted in his death. It was held in Peak v. Shasted, 21 Ill. 137, that a minor could only appear to defend by a guardian and not in person or by attorney, and that in case the minor failed to appear to have a guardian appointed it was the duty of the court, on application by plaintiff, to appoint a guardian, which, to be regular, must be done before plea; and that if an infant appear in person or by attorney, it is error in fact, which may be assigned in the court in which

of January, 1941, and at the time of making the affidavit, he was a minor of the age of 19 years, and that no guardian had been appointed for him. He also set up that he did not know any suit was pending against him and learned shortly after February 24, 1941, that the judgment had been entered against him on January 14 for \$10,000. His affidavit averred that he had a good defense to the cause of action, specifying that he was not negligent in the manner alleged in the complaint; that the deceased was not in the exercise of due care, and that he (defendant) did not act willfully, wantonly or maliciously, as alleged in one of the counts of the complaint. A rule was entered on the plaintiff to answer the written motion within 5 days. The motion was heard by the court upon the motion of the plaintiff to strike the motion in the nature of the writ of error coram nobis and upon affidavits and testimony received in open court. An order was entered sustaining the motion as to the defendant, Grace E. Goewitz, and vacating the judgment as to her, but as to the defendant, Charles Goewitz, the motion was denied and an order entered that the judgment therefore entered against him stand. The motion to strike admitted, and, at any rate, the undisputed evidence taken showed, that Charles Goewitz was a minor 19 years of age at the time the accident occurred in which Mr. Tong received injuries which resulted in his death. It was held in Park v. Paster, 21 Ill. 137, that a minor could only appear to defend by a guardian and not in person or by attorney, and that in case the minor failed to appear to have a guardian appointed it was the duty of the court, on application by plaintiff, to appoint a guardian, which, to be regular, must be done before plea; and that if an infant appear in person or by attorney, it is error in fact, which may be assigned in the court in which

the judgment was rendered, and the judgment may be set aside upon proper motion, even after the term at which it was entered. The limitation of time for the filing of such a motion is fixed by §72 of the Practice Act at 5 years. Other cases which announce a similar rule are White v. Kilmartin, 205 Ill. 525, 526, 527; McCarthy v. Cain, 301 Ill. 534, 538, 539; and Simpson v. Anderson, 305 Ill. 172, 175.

The plaintiff says: "The primary question here is: was the motion in the nature of a writ of error coram nobis properly filed in the original proceeding from which it prays relief and as a part thereof, after term time had expired? and had the trial Court jurisdiction to determine the motion?" Plaintiff, under his Points and Authorities, cites Seither & Cherry Co. v. Board of Education, 283 Ill. App. 392; People v. McArthur, 283 Ill. App. 467, and Topel v. Personal Loan & Savings Bank, 280 Ill. App. 558. In the argument, however, these cases are not analyzed. As a matter of fact, we do not know of any such motion that has ever been filed other than in the original suit. As these cases hold it is true, of course, the motion (nevertheless) is considered in the nature of a new suit. On the record we hold the defendant minor was entitled to have his motion granted and the judgment set aside. For the error in denying it the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

the judgment was rendered, and the judgment may be set aside upon proper motion, even after the term at which it was entered. The limitation of time for the filing of such a motion is fixed by §72 of the Practice Act at 5 years. Other cases which announce a similar rule are Wife v. Kilmer, 203 Ill. 525, 528, 527; McCarthy v. Cain, 201 Ill. 524, 528, 529; and Simson v. Anderson, 203 Ill. 175, 176.

The plaintiff says: "The primary question here is: was the motion in the nature of a writ of error cover motion properly filed in the original proceeding from which it seeks relief and as a part thereof, after term time had expired? and had the trial Court jurisdiction to determine the motion?" Plaintiff, under his Points and Authorities, cites Belmer & Cherry Co. v. Board of Education, 183 Ill. App. 322; People v. Acarthur, 223 Ill. App. 487, and Topal v. Personal Loan & Savings Bank, 280 Ill. App. 528. In the argument, however, these cases are not analyzed. As a matter of fact, we do not know of any such motion that has ever been filed other than in the original suit. As these cases hold it is true, of course, the motion (nevertheless) is considered in the nature of a new suit. On the record we hold the defendant minor was entitled to have his motion granted and the judgment set aside. For the error in denying it the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McCarthy, P. J., and O'Connor, J., concur.

41823

HARRY L. DRAKE,)
Appellant,)
v.)
EUGENE V. DIGGINS,)
Appellee.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

314 I.A. 192¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment by confession to be entered against defendant on a written lease for \$274.30. Afterward defendant filed a petition to vacate the judgment and for leave to defend. The judgment was opened up and it was ordered that it stand as security, the petition to stand as defendant's affidavit of defense. Some time afterward, the case was tried before the court without a jury, there was a finding and judgment against plaintiff and he appeals.

The record discloses that August 31, 1939, the parties entered into a written lease whereby an apartment was leased to defendant for a period from October 1, 1939, to September 30, 1940, at a rental of \$58 per month, payable in advance. Defendant and his family occupied the apartment, paid the rent promptly and vacated it about April 29, 1940. The apartment thereafter was vacant for the months of May, June, July and August and it was to recover the rent for these months that plaintiff sues.

Defendant testified that about April 9 or 10, 1940, he went to see D. M. Ruggles who was in charge of renting the building in which the apartment was located; that he told Mr. Ruggles he was contemplating sub-leasing the apartment because his wife had acquired a piece of property and if they could sublet the apartment they were going to move; that Ruggles said he was sorry to lose defendant as a tenant but he then had his secretary prepare a sign to be placed at the building showing the apartment for rent. The sign was placed at the building and shortly

MR. JUSTICE CLOON OR DELIVERED THE OPINION OF THE COURT.
 31 JUL 1932
 OF CHICAGO
 HENRY L. BRAX, Appellant,
 v.
 HENRY A. BRIGGS, Appellee.

Plaintiff caused judgment by confession to be entered against defendant on a written lease for 124.00. Afterward defendant filed a petition to vacate the judgment and for leave to defend. The judgment was opened up and it was ordered that it stand as security. The petition to stand as defendant's affidavit of defense. Some time afterward, the case was tried before the court without a jury, there was a finding and judgment against plaintiff and he appeals.

The record discloses that August 31, 1930, the parties entered into a written lease whereby an apartment was leased to defendant for a period from October 1, 1930, to September 30, 1940, at a rental of \$8 per month, payable in advance. Defendant and his family occupied the apartment, paid the rent promptly and vacated it about April 20, 1940. The apartment thereafter was vacant for the months of May, June, July and August and it was to recover the rent for these months that plaintiff sues. Defendant testified that about April 9 or 10, 1940, he went to see H. W. Hughes who was in charge of renting the building in which the apartment was located; that he told Mr. Hughes he was contemplating sub-letting the apartment because his wife had acquired a piece of property and if they could sublet the apartment they were going to move; that Hughes said he was sorry to lose defendant as a tenant but he then had his secretary prepare a sign to be placed at the building showing the apartment for rent. The sign was placed at the building and shortly

thereafter persons called to see defendant about renting the apartment. That one person who looked at the apartment was pleased with it and was willing to pay \$55 a month instead of the \$58 mentioned in the lease; that this was agreeable to defendant and that he would pay the balance to plaintiff; that the applicant gave defendant references and the next morning defendant called at Ruggles's office and told Ruggles he had a tenant for the apartment; gave his name and told Ruggles the party was well recommended; that Ruggles replied he would not rent it because of racial reasons. Defendant further testified he had two or three other applications and went down to see Mr. Ruggles; that one of the persons offered to pay \$45 a month rent for the apartment but Mr. Ruggles wanted \$60 a month.

Ruggles, called by defendant as an adverse witness for cross examination, testified among other things that before May 1, 1940, he had a telephone conversation with defendant and defendant told him he had bought a two-flat building and was desirous of subletting the apartment and "I told him we would be glad to work with him and help him rent it." That afterward a sign, apparently made at plaintiff's office, was placed in front of the building showing the apartment was for rent. Ruggles further testified that May 11 or 12, he called Mr. Diggins and told him he had a prospective tenant "and Mr. Diggins said he wasn't satisfactory to him." That the prospective tenant wanted to take the apartment the first of June, at \$45 a month until September when the lease by its terms would end. That defendant "never presented me in any way with a tenant." When called as a witness for plaintiff he testified "We don't look into the nationality of a prospective tenant, the only thing we are interested in renting apartments is, can the man pay the rent, and if they have behaved themselves where they lived before."

thereafter persons called to see defendant about renting the apartment. That one person who looked at the apartment was pleased with it and was willing to pay \$5 a month in rent of the \$8 mentioned in the lease; that this was acceptable to defendant and that he could pay the balance to plaintiff; that the plaintiff gave defendant references and the next morning defendant called at Ruggles's office and told Ruggles he had a tenant for the apartment; gave him name and told Ruggles the party was well recommended; that Ruggles replied he would not rent it because of racial reasons. Defendant further testified he had two or three other applications and went down to see Mr. Ruggles; that one of the persons offered to pay \$5 a month rent for the apartment but Mr. Ruggles wanted \$8 a month.

Ruggles, called by defendant as an adverse witness for cross examination, testified among other things that before May 1, 1940, he had a telephone conversation with defendant and defendant told him he had bought a two-flat building and was desirous of subletting the apartment and "I told him we could be glad to work with him and help him rent it." That afternoon a sign, apparently made at plaintiff's office, was placed in front of the building showing the apartment was for rent. Ruggles further testified that May 11 or 12, he called Mr. Diggins and told him he had a prospective tenant "and Mr. Diggins said he didn't object to him." That the prospective tenant wanted to take the apartment the first of June, at \$5 a month until September when the lease by its terms would end. That defendant never presented me in any way with a tenant. When called as a witness for plaintiff he testified "I don't look into the nationality of a prospective tenant, the only thing I am interested in renting apartments is, can the man pay the rent, and if they have behaved themselves when they lived before."

There is other evidence in the record but we think it unnecessary to refer to it. The question for decision was one of fact and not of law. The court apparently believed defendant's version that he had submitted a suitable tenant but that Ruggles refused to lease the apartment for racial reasons only. But in the view we take of the case we think this question is immaterial. The lease provided that the apartment should not be sublet without the written consent of the lessor. It also contained the following provision: "If Lessee shall vacate or abandon said premises *** the premises *** may be relet by Lessor for such rent and such terms and such period as Lessor may elect without releasing Lessee from any liability hereunder (but Lessor shall not be required to accept or receive any tenant offered by Lessee or by others)."

Plaintiff's position is that under the terms of the lease he had the right to refuse to sublet the apartment for any reason or for no reason at all. We think this contention must be sustained. The lease provided the Lessor should not be required to accept any tenant offered by the Lessee. In Hirsch v. Home Appliances, Inc., 242 Ill. App. 418, judgment by confession was entered on the lease for failure to pay rent. The provisions in the lease there involved were substantially the same as those in the lease in the case at bar. The defense there interposed was that the tenant had submitted a reliable person who was willing to sublet the premises but that plaintiff refused to lease the premises unless at a large increase of rent. In that case the court discussed the authorities pro and con as to the duty, if any, of the landlord to mitigate the damages in such a situation and after disposing of the question of law on that point the court continued: "But whichever theory or rule should be adopted in this respect, it seems to us (construing the affidavit of defendant most strongly against it, as we must) that it fails

There is other evidence in the record but we think it unnecessary to refer to it. The question for decision was one of fact and not of law. The court apparently believed defendant's version that he had submitted a suitable tenant but that Ruggles refused to lease the apartment for social reasons only. But in the view we take of the case we think this question is immaterial. The lease provided that the apartment should not be sublet without the written consent of the lessor. It also contained the following provision: "If lessee shall vacate or abandon said premises *** the premises *** may be relet by lessor for such rent and such terms and such period as lessor may direct without releasing lessee from any liability hereunder (but lessor shall not be required to accept or receive any tenant offered by lessee or by others)."

Plaintiff's position is that under the terms of the lease he had the right to refuse to sublet the apartment for any reason or for no reason at all. We think this contention must be sustained. The lease provided the lessor should not be required to accept any tenant offered by the lessee. In Hirsh v. Home Appliances, Inc., 242 Ill. App. 418, judgment by confession was entered on the lease for failure to pay rent. The provisions in the lease there involved were substantially the same as those in the lease in the case at bar. The defense there interposed was that the tenant had submitted a reliable person who was willing to sublet the premises but that plaintiff refused to lease the premises unless at a large increase of rent. In that case the court discussed the authorities pro and con as to the duty, if any, of the landlord to mitigate the damages in such a situation and after disposing of the question of law on that point the court continued: "But whichever theory of rule should be adopted in this respect, it seems to us (construing the affidavit

to set up a meritorious defense. In the statement of facts we have recited at length the provisions of the lease in anticipation of this point. No case is cited from any court of any State from which it would not be easy to distinguish the record which we must here consider. No case holds, so far as we are aware, that the parties to a lease may not enter into a valid agreement with respect to this question by which the parties would be bound (and when we come to examine the lease it is at once apparent that the parties have specifically agreed that the landlord shall in no case be bound) to do the thing which defendant now contends plaintiff is obligated to do. If there is any decision anywhere which holds that the parties may not contract freely with each other with respect to such a situation as is disclosed by the affidavit of merits, that decision has not been called to our attention."

But defendant contends the provisions of the lease, requiring the consent of the landlord in writing to the subletting of the premises, and the provision that the landlord is not required to accept any tenant offered by the tenant, were waived by plaintiff when Ruggles refused to accept the tenant on solely racial grounds.

We have examined the entire record and are unable to find that the question of waiver was in any way mentioned or referred to in the trial court. Defendant's petition filed in support of his motion to open up the judgment and for leave to defend has no allegation that any provision of the lease had been waived. Moreover, we think there was no waiver but on the contrary that plaintiff was standing on the terms of the written lease. He introduced the lease in evidence, called attention to the fact that no written consent to an assignment was had. although the lease required an assignment by the lessor, e

to set up a meritorious defense. In the statement of facts we have recited at length the provisions of the lease in anticipation of this point. No case is cited from any court of any state from which it would not be easy to distinguish the record which we must here consider. No case holds, so far as we know, that the parties to a lease may not enter into a valid agreement

with respect to this question by which the parties would be bound (and when we come to examine the lease it is at once apparent that the parties have specifically agreed that the landlord shall in no case be bound) to do the thing which defendant now contends plaintiff is obligated to do. If there is any decision anywhere which holds that the parties may not contract freely with each other with respect to such a situation as is disclosed by the affidavit of merits, that decision has not been called to our attention."

But defendant contends the provisions of the lease,

requiring the consent of the landlord in writing to the assignment of the premises, and the provision that the landlord is not required to accept any tenant offered by the tenant, were waived by plaintiff when Hughes refused to accept the tenant on solely racial grounds.

We have examined the entire record and are unable to

find that the question of waiver was in any way mentioned or referred to in the trial court. Defendant's position relied in support of his motion to open up the judgment and for leave to defend has no allegation that any provision of the lease had been waived. Moreover, we think there was no waiver but on the contrary that plaintiff was acting on the terms of the written lease. He introduced the lease in evidence, called attention to the fact that no written consent to an assignment was required, although the lease required an assignment by the tenant, and

For the reasons stated, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to reinstate the judgment by confession.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

For the reasons stated, the judgment of the majority
court of Chicago is reversed and the cause remanded with dispo-
sition to reinstate the judgment by consensus.

REVEREND AND REMANDED WITH DISPOSITION.

Respectfully, P. J., and Matson, J., concur.

314 Dec 29 1939
41823

HARRY L. DRAKE,
Appellant,

v.

EUGENE V. DIGGINS,
Appellee

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment by confession to be entered against defendant on a written lease for \$274.30. Afterward defendant filed a petition to vacate the judgment and for leave to defend. The judgment was opened up and it was ordered that it stand as security, the petition to stand as defendant's affidavit of defense. Some time afterward, the case was tried before the court without a jury, there was a finding and judgment against plaintiff and he appeals.

The record discloses that August 31, 1939, the parties entered into a written lease whereby an apartment was leased to defendant for a period from October 1, 1939, to September 30, 1940, at a rental of \$58 per month, payable in advance. Defendant and his family occupied the apartment, paid the rent promptly and vacated it about April 29, 1940. The apartment thereafter was vacant for the months of May, June, July and August and it was to recover the rent for these months that plaintiff sues.

Defendant testified that about April 9 or 10, 1940, he went to see D. M. Ruggles who was in charge of renting the building in which the apartment was located; that he told Mr. Ruggles he was contemplating sub-leasing the apartment because his wife had acquired a piece of property and if they could sublet the apartment they were going to move; that Ruggles said he was sorry to lose defendant as a tenant but he then had his secretary prepare a sign to be placed at the building

THOMAS V. MCGOWAN, Plaintiff,
 vs.
 MARY L. MCGOWAN, Defendant.
 CHANCERY COURT
 IN CHARGE

THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK.

Plaintiff moved judgment on petition to be set aside and to have judgment entered in a writ of habeas corpus. Defendant filed a motion to vacate the judgment and to have judgment entered in a writ of habeas corpus. The court was divided 4 to 3 in favor of defendant. The petition to set aside the judgment was denied. The writ of habeas corpus was granted. The court was divided 4 to 3 in favor of defendant. The petition to set aside the judgment was denied. The writ of habeas corpus was granted.

The record discloses that on April 12, 1930, the plaintiff entered into a written lease with the defendant for a period of one year, to be terminated on April 12, 1931, at a rental of \$100 per month, payable in advance. The defendant and his family occupied the apartment, and the plaintiff promptly and vacated it about April 12, 1931. The defendant was absent for the month of May, 1931, and the plaintiff was unable to recover the rent for these months. The plaintiff moved.

Defendant testified that about April 5 or 10, 1930, he went to see J. M. Magliac who was in charge of renting the building in which the apartment was located; that he told Mr. Magliac he was contemplating sub-letting the apartment because his wife had acquired a piece of property and if they could sublet the apartment they were going to move; that Magliac said he was sorry to lose defendant as a tenant but he then had his secretary prepare a sign to be placed at the building.

showing the apartment was for rent. The sign was placed at the building and shortly thereafter persons called to see defendant about renting the apartment. That one person who looked at the apartment was pleased with it and was willing to pay \$55 a month instead of the \$58 mentioned in the lease; that this was agreeable to defendant and that he would pay the balance to plaintiff; that the applicant gave defendant references and the next morning defendant called at Ruggles's office and told Ruggles he had a tenant for the apartment; gave his name and told Ruggles the party was well recommended; that Ruggles replied he would not rent it because of racial reasons. Defendant further testified he had two or three other applications and went down to see Mr. Ruggles; that one of the persons offered to pay \$45 a month rent for the apartment but Mr. Ruggles wanted \$60 a month.

Ruggles, called by defendant as an adverse witness for cross examination, testified among other things that before May 1, 1940, he had a telephone conversation with defendant and defendant told him he had bought a two-flat building and was desirous of subletting the apartment and "I told him we would be glad to work with him and help him rent it." That afterward a sign, apparently made at plaintiff's office, was placed in front of the building showing the apartment was for rent. Ruggles further testified that May 11 or 12, he called Mr. Diggins and told him he had a prospective tenant and Mr. Diggins said he wasn't satisfactory to him." That the prospective tenant wanted to take the apartment the first of June, at \$45 a month until September when the lease by its terms would end. That defendant "never presented me in any

also in the apartment was for rent. The sign was placed at
the building and directly thereafter person called to see the
tenant about renting the apartment. That one person who
looked at the apartment was pleased with it and was willing
to pay \$50 a month instead of the \$100 mentioned in the notice;
that this was sufficient to defendant and that he would not the
balance to himself; that the apartment gave defendant the
furnaces and the next morning defendant called at agent's
office and told him that he was a tenant for the apartment;
Gave his name and told him that the apartment was well furnished;
that he had replied he would not rent it because of small
reasons. Defendant further testified on May 1, 1942, that one of the
apartments and went down to see it. Defendant was one of the
persons called to pay the apartment for the apartment and
Mr. Hughes wanted \$100 a month.
Defendant, called by defendant as an adverse witness
for cross examination, testified that about October 1941, before
May 1, 1942, he had a telephone conversation with defendant and
defendant told him he had wanted a two-flat building and was
defendant of building the apartment and told him he would
be glad to rent with him and his room etc. Then afterwards
a sign, apparently made by defendant's office, was placed in
front of the building stating the apartment was for rent.
Defendant further testified that May 11 or 12, he called Mr.
Hughes and told him he had a prospective tenant and Mr.
Hughes said he would be interested to see it. That the pros-
pective tenant wanted to see the apartment the next day
there, at 123 a house until defendant was called by the
tenant about rent. That defendant never mentioned to him any

way with a tenant." When called as a witness for plaintiff he testified "We don't look into the nationality of a prospective tenant, the only thing we are interested in renting apartments is, can the man pay the rent, and if they have behaved themselves where they lived before."

There is other evidence in the record but we think it unnecessary to refer to it. The question for decision was one of fact and not of law. The court apparently believed defendant's version that he had submitted a suitable tenant but that Ruggles refused to lease the apartment for racial reasons only. But in the view we take of the case we think this question is immaterial. The lease provided that the apartment should not be sublet without the written consent of the lessor. It also contained the following provision: "If Lessee shall vacate or abandon said premises *** the premises *** may be relet by Lessor for such rent and such terms and such period as Lessor may elect without releasing Lessee from any liability hereunder (but Lessor shall not be required to accept or receive any tenant offered by Lessee or by others.)"

✓ Plaintiff's position is that under the terms of the lease he had the right to refuse to sublet the apartment for any reason or for no reason at all. We think this contention must be sustained. The lease provided the Lessor should not be required to accept any tenant offered by the Lessee. In Hirsch v. Home Appliances, Inc. 242 Ill. App. 418, judgment by confession was entered on the lease for failure to pay rent. The provisions in the lease there involved were substantially the same as those in the lease in the case at bar. The defense there interposed was that the tenant had submitted a reliable person who was willing to sublet the premises but that plaintiff

refused to lease the premises unless at a large increase of rent. In that case the court discussed the authorities pro and con as to the duty, if any, of the landlord to mitigate the damages in such a situation and after disposing of the question of law on that point the court continued: "But whichever theory or rule should be adopted in this respect, it seems to us (construing the affidavit of defendant most strongly against it, as we must) that it fails to set up a meritorious defense. In the statement of facts we have recited at length the provisions of the lease in anticipation of this point. No case is cited from any court of any State from which it would not be easy to distinguish the record which we must here consider. No case holds, so far as we are aware, that the parties to a lease may not enter into a valid agreement with respect to this question by which the parties would be bound (and when we come to examine the lease it is at once apparent that the parties have specifically agreed that the landlord shall in no case be bound) to do the thing which defendant now contends plaintiff is obligated to do. If there is any decision anywhere which holds that the parties may not contract freely with each other with respect to such a situation as is disclosed by the affidavit of merits, that decision has not been called to our attention."

But defendant contends the provisions of the lease, requiring the consent of the landlord in writing to the subletting of the premises, and the provision that the landlord is not required to accept any tenant offered by the tenant, were waived by plaintiff when Ruggles refused to accept the tenant on solely racial grounds.

refused to lease the premises unless at a high amount of
rent. In fact the owner disclaimed the responsibility
and went to the bank, it was, on the ground of the
the damage in the light and other conditions of the
decision at the time that the owner was disclaimed. It was
ever fairly or truly should be accepted in this regard, it is
to me (concerning the liability of the owner) was not
of that is, at the time (and it is not up to the
decision. In the decision at the time we were not
the provisions of the lease in relation to this point.
No case is cited from any source or any other source
would not be made an exception to the general rule
considered. No case is cited, or it is to be said, that
parties to a lease may have entered into a written agreement with
respect to this question by which the parties would be bound
(and when we come to examine the lease it is of some importance
that the parties have made this agreement and the decision
will in no case be binding) so as to bind the parties
not contented plaintiff is entitled to the lease in the
decision anywhere which would bind the parties and the decision
itself is made with respect to the decision in the
discovery of the validity of the decision and the decision
called to our attention.

But defendant contends the provisions of the lease
regarding the amount of the rent in writing to the sub-
tenant of the premises, and the provision that the landlord is
not required to accept any rent offered by the tenant, were
waived by plaintiff when he accepted the decision and the
on solely legal grounds.

We have examined the entire record and are unable to find that the question of waiver was in any way mentioned or referred to in the trial court. Defendant's petition filed in support of his motion to open up the judgment and for leave to defend has no allegation that any provision of the lease had been waived. Moreover, we think there was no waiver but on the contrary that plaintiff was standing on the terms of the written lease. We introduced the lease in evidence, called attention to the fact that no written consent to an assignment was had, although the lease required an assignment by the lessor, etc.

For the reasons stated, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to reinstate the judgment by confession.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, F. J., and Matchett, J., concur.

He has examined the entire record and are unable
find that the provision of waiver was in any way mentioned or
referred to in the trial court. Defendant's petition filed
support of the motion to open up the judgment and for leave to
defend has no allegation that any provision of the lease was
waived. Moreover, we think there was no waiver but on the con-
trary that plaintiff was standing on the terms of the written
lease. We introduced the lease in evidence, called attention
to the fact that no written consent to an assignment was had,
although the lease required an assignment by the lessor, etc.
For the reasons stated, the judgment of the court
is affirmed and the cause remanded with
directions to reinstate the judgment by satisfaction.

REVEREND AND HONORABLE JUSTICE

Respectfully, J. L. and J. L., Attorneys.

41861

MERLE SLANE,

v.

THE LAKE SHORE INDEX, Incorporated,

THE LAKE SHORE INDEX, Incorporated,
JAMES H. SKEWES and CARL O. SKINROOD,
Appellants,

v.

EVANSTON NEWS INDEX, Incorporated,
MERLE SLANE and FIRST NATIONAL BANK
OF CHICAGO, a Corporation, as Trustee,
Appellees.

69
440
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

314 I.A. 192²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 2, 1938, Merle Slane filed his complaint in equity in the Superior court of Cook county against The Lake Shore Index, Inc., to foreclose the lien of a trust deed given to secure \$125,000 being the unpaid balance of the purchase price of a newspaper purchased by defendants from plaintiff. Later, on the same day, in the same court, defendants in that case, The Lake Shore Index, Inc., James H. Skewes and Carl O. Skinrood, filed their complaint in two counts. The first count prayed for a rescission of the agreement entered into between the parties October 1, 1936, for the purchase and sale of the newspaper and for a cancellation of the notes and trust deed sought to be foreclosed by Slane, and for an accounting and an injunction. The second count set up a separate legal cause of action for damages. August 5, 1938, the court entered an order consolidating the two causes and that the separate suit of The Lake Shore Index, Inc., for the rescission of the contract and the cancellation of the notes and trust deed be tried first as a separate and distinct equitable cause of action. [Slane's foreclosure suit and the

11-10-1938

THE LAW OFFICE OF

v.

THE LAW OFFICE OF

THE LAW OFFICE OF
JAMES E. HARRIS AND
ASSOCIATES

v.

THE LAW OFFICE OF
JAMES E. HARRIS AND
ASSOCIATES

MR. JAMES E. HARRIS, Attorney at Law

August 2, 1938, said Harris filed his complaint in

equity in the superior court of Cook County against The Law

Office, Inc., to dissolve the lien of a first deed placed

to secure \$10,000 being the unpaid balance of the purchase price

of a newspaper purchased by defendant from plaintiff. Later,

on the same day, in the same court, defendant in said case, The

Law Office, Inc., James E. Harris and Carl C. Winick,

filed their complaint in two counts. The first count prayed for

a rescission of the agreement entered into between the parties

October 1, 1935, for the purchase and sale of the newspaper and

for a cancellation of the notes and first deed sought to be fore-

closed by plaintiff, and for an accounting and an injunction. The

second count set up a separate legal cause of action for damages,

August 2, 1938. The court entered an order consolidating the two

causes and that the parties wait of the law firm of Harris, Inc.,

for the rescission of the contract and the cancellation of the

notes and first deed be tried first as a separate and distinct

separate cause of action. The court's decision will not be

second count of the complaint of The Lake Shore Index, Inc., James H. Skewes and Carl O. Skinrood were held in abeyance.] It was further ordered that the equitable cause be referred to a master in chancery with directions that the proofs be closed within 60 days and that he submit his report within 90 days. The hearing before the master began September 14, 1938, and the last hearing was April 22, 1940. The master made his report June 12, 1940, recommending that the cause be dismissed for want of equity. December 18, 1940, a decree was entered in accordance with the recommendations of the master. The Lake Shore Index, Inc., James H. Skewes and Carl O. Skinrood prosecute this appeal and will be referred to as plaintiffs, and Merle Slane and the Evanston News Index, Inc., as defendants.

We might say that while this suit was pending in the trial court a voluntary petition in bankruptcy was filed by the creditors against defendant, Lake Shore Index, Inc., July 13, 1940, it was adjudged a bankrupt and a trustee appointed who sold all of its property, both real and personal, to Richard H. Jacobson, the successful bidder who has been substituted as a defendant in the instant case.

The record discloses that in 1934 defendant Merle Slane purchased a daily newspaper which for some time had been published in Evanston, the title to which was taken by the Evanston News Index, Inc., a corporation, and continued the publication until October 1, 1936, when a contract was entered into between the Evanston News Index, Inc., and James H. Skewes and Carl O. Skinrood whereby the newspaper plant, including all equipment, was sold to Skewes and Skinrood for \$200,000. Concurrently with the execution of the agreement the first payment of \$50,000 was placed in escrow by the buyers with the Chicago Title & Trust Company

second count of the complaint of the late John Jones, Inc., James H. Jones and Carl G. Jones were held in contempt. It was further ordered that the writ of habeas corpus be granted to a master in chancery with authority that the records be placed within 60 days and that he submit his report within 90 days. The hearing before the master began September 1, 1940, and the last hearing was April 22, 1941. The master made his report June 12, 1940, recommending that the writ be dissolved for want of equity. December 18, 1940, a decree was entered in accordance with the recommendation of the master. The late John Jones, Inc., James H. Jones and Carl G. Jones were held in contempt and all be referred to as plaintiffs, and John Jones and the Evanston News Index, Inc., as defendants.

It might be said that this suit was pending in the trial court a voluntary petition in bankruptcy was filed by the creditors against defendant, late John Jones, Inc., July 1, 1940, it was adjudged a bankrupt and a trustee appointed and sold all of its property, both real and personal, in October, 1940, the successful bidder who was paid \$100,000 as a defendant in the instant case.

The record discloses that in 1938 defendant John Jones purchased a daily newspaper which for some time had been published in Evanston, the title of which was taken by the Evanston News Index, Inc., a corporation, and continued the publication until October 1, 1938, when a contract was entered into between the Evanston News Index, Inc., and James H. Jones and Carl G. Jones whereby the newspaper plant, including all equipment, was sold to James and Richard for \$500,000. Consequently with the execution of the agreement the first payment of \$100,000 was placed in escrow by the buyers with the Chicago Title & Trust Company.

to be paid to the seller November 10, 1936. Possession of the newspaper plant was turned over to the buyers October 1, 1936, and they continued to operate it. Afterward the \$50,000 was turned over to the seller. The trust deed, notes and chattel mortgage on the property to secure the payment of \$125,000 of the purchase price were executed by the buyers. It was to foreclose the lien of this trust deed that Slane filed his complaint, as above mentioned.

To evidence the unpaid balance, \$150,000, of the purchase price, The Lake Shore Index, Inc., executed its three promissory notes, one for \$25,000 due January 15, 1937, one for \$75,000 due in monthly installments of \$600 each, beginning November 1, 1936, to and including September 1, 1941, and the remaining \$39,600 of this note due October 1, 1941, with interest at 4 per cent per annum, payable monthly, and note No. 3 for \$50,000 payable in monthly installments of \$500 beginning November 1, 1941, to and including February 1, 1950, with interest at 4 per cent per annum, payable monthly. The \$25,000 note due January 15, 1937 and the monthly payments thereafter, were made to July 1, 1938, a period of about 22 months although such payments were not always made on the due dates. Default was made in the payment due July 1, 1938, and a month thereafter, August 2, 1938, the bill to foreclose was filed as was also the suit for rescission, cancellation, etc., above mentioned.

The theory of plaintiffs that the contract of October 1, 1936, should be rescinded and the notes and trust deed cancelled, is that they were induced to enter into it through the fraudulent acts of Slane, viz., (1) that in March, 1936, Slane caused a blind advertisement which was fraudulent, to be published in the "Editor and Publisher" a trade magazine, stating the newspaper

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to be paid to the seller November 10, 1935. In connection of the newspaper plant was turned over to the buyers October 1, 1935, and they continued to operate it. Afterward the \$2,000 was turned over to the seller. The trust fund, which was created on the proceeds to secure the payment of \$10,000 of the purchase price was dissolved by the buyers. It was so dissolved. The lien of this trust fund was filed in the complaint, as above mentioned.

To evidence the unpaid balance, \$10,000, of the purchase price, The Lake Shore Trust, Inc., executed the above mentioned notes, one for \$2,000 due January 1, 1936, and for \$78,000 due in monthly installments of \$200 each, beginning November 1, 1935, to and including September 1, 1941, and the remaining \$10,000 of this note due October 1, 1941, with interest at 4 per cent per annum, payable monthly, and note No. 2 for \$10,000 payable in monthly installments of \$500 beginning November 1, 1941, to and including February 1, 1950, with interest at 4 per cent per annum, payable monthly. The \$10,000 note due January 1, 1937, and the monthly payments thereon, were made to July 1, 1938, a period of about 22 months although such payments were not always made on the due date. Default was made in the payment on July 1, 1939, and a notice thereafter, August 1, 1939, was given to foreclose was filed as was also the suit for foreclosure, cancellation, etc., above mentioned.

The theory of plaintiff that the contract of October 1, 1935, should be rescinded and the notes and trust fund cancelled, is that they were issued to carry into effect the purchase of the plant of the Lake Shore Trust, Inc., which was cancelled. The notes of the Lake Shore Trust, Inc., (1) that in March, 1936, the plant advertisement which was cancelled, to be published in the "Editor and Publisher" a trade magazine, stating the purpose

was for sale and would show a profit of \$30,000 annually, when in fact it was losing money each month. (2) That in the negotiations between the parties in Chicago, July 23, 1936, a "false profit and loss statement containing the statement that the newspaper had made a net profit of \$10,256.26 for the six months period of from January to June, inclusive, 1936, whereas, in fact, it had lost \$121.86 for that period; (3) the false balance sheet showing the cost of the newspaper to Slane to be \$284,151.25, which was \$159,151.25 more than he paid for it; (4) the ABC books of Slane, in evidence here, containing the official records of the average daily net paid circulation before he sold the newspaper, which records show that the circulation of the newspaper, instead of being 6000 subscribers for the six months prior to October 1, 1936, as represented by Slane to Skewes and Skinrood, was only 3299; (5) the checks of the Evanston News Index, Incorporated, also in evidence, and payable to advertisers for the rebates on their advertising, showing the falsity of Slane's statements that he had never granted rebates to advertisers." (The record is voluminous - more than 6,000 pages.)

The theory of Slane is that he was guilty of no fraud in the negotiations and sale of the newspaper and that James H. Skewes, the dominant party representing the purchasers, was a newspaper man of about 25 years' experience and had bought and sold from 10 to 15 different newspaper properties; that he acted on the information he had received from a number of sources and was not misled by anything Slane did.

The master sustained Slane's contentions, found there was no fraud and recommended the complaint be dismissed for want of equity. The chancellor followed the finding and recommendation of the master and a decree was entered accordingly.

was for sale and would have a profit of \$50,000 annually, which in fact it was to the point of sale. (b) But in the negotiations between the parties in Chicago, July 12, 1936, a "lease" profit and lease agreement containing the statement that the newspaper had made a net profit of \$10,000 for the six months period of from January to June, inclusive, 1936, wherein, in fact, it had lost \$11,000 for the same period; (c) the false balance sheet showing the cost of the newspaper to Glass to be \$100,000.00, which was \$120,000.00 more than he paid for it; (d) the two copies of Glass, in evidence here, containing the official records of the average daily net paid circulation before he sold the newspaper, which records show that the circulation of the newspaper, instead of being 5000 subscribers for the six months prior to October 1, 1936, he represented by Glass to Glass and others, was only 2500; (e) the check of the Western Union Telegraph Company, also in evidence, and payable to advertising for the rates on their advertising, showing the failure of Glass's statements that he had never created a false circulation; (f) The record in volume 2 - more than 2,500 pages.)

The theory of Glass is that he was guilty of no crime in the negotiations with sale of the newspaper and that Glass, the defendant, was a bona fide party representing the newspaper, was a newspaper man of about 25 years' experience and had bought and sold from 1910 to 1936 different newspaper properties; that he acted on the information he had received from a number of sources and was not aided by anything Glass did.

The master sustained Glass's contention, found Glass was no fraud and recommended the verdict be directed for want of equity. The objection followed the finding and recommendation of the master and a decree was entered accordingly.

(1) As to the false advertisement.

The record discloses that March 7, 1936, Slane caused to be published in "Editor and Publisher" (a trade magazine published in New York City) the following blind advertisement: "A daily newspaper in rich midwest community. Equipment of the best. Will show profit of thirty thousand plus a year. Can be purchased for \$250,000. Appraisal shows physical worth far more. Property demands high type man as publisher. A good organization. Your correspondence in confidence. An opportunity that seldom presents. Address Owner, A-423, Editor & Publisher." Skewes learned that Slane had inserted the advertisement and he came to Chicago in July, 1936. Counsel for plaintiffs complain that this advertisement "failed to state to prospective purchasers that the advertiser had operated the newspaper for four years, during which it had failed to make more than a few dollars profit per year, if it made any profit at all. It also failed to state that the newspaper which could be 'purchased for \$250,000' had been bought by the advertiser two years previously for \$125,000." Other complaints are made which we think it unnecessary to mention here because we think it clear that no one would expect one who was endeavoring to sell a newspaper to advertise that it had made little or no profit during the past 4 years and that 2 years before the advertisement appeared the owner had paid but \$125,000 for it and that it could be purchased for \$250,000.

(2) and (3) As to the false profit and loss statement and the false balance sheet which were exhibited by William M. Layman, representing Slane and the Evanston paper, to Skewes and Skinrood at their meeting in Chicago July 23, 1936:

The evidence shows that Layman, Skewes and Skinrood met July 23, 1936, pursuant to appointment, at Layman's office in

(1) as to the false advertisement.

The record discloses that on July 7, 1935, James learned

to be entitled to "Editor and Publisher" (a trade magazine)

published in New York City) the following false advertisement:

"Daily newspaper in rich almost community. Community of New

York. All show profit of thirty thousand plus a year. Can be

purchased for \$100,000. Absolute money making with the new

property because high type and publisher. A good opportunity

for. Your correspondence in confidence. An opportunity that

cannot be lost. Address: Editor, 1-101, Editor & Publisher.

James learned that James had learned the advertisement had been

sent to Chicago in July, 1935. Counsel for James's company

that this advertisement "failed to state the prospective publisher

that the advertiser had operated the newspaper for four years,

during which it had failed to make more than a few dollars profit

per year, it made any profit at all. It also failed to state

that the newspaper which could be purchased for \$100,000 had

been bought by the advertiser two years previously for \$100,000.

Other complaints are made which we think it unnecessary to mention

here because we think it clear that no one would expect one who

was endeavoring to sell a newspaper to advertise that it had made

little or no profit during the past 4 years and that a year or

more the advertisement revealed the owner had paid out \$100,000

for it and that it could be purchased for \$100,000.

(2) and (3) as to the false profit and loss statement

and the false balance sheet which were exhibited by William M.

James, representing James and the Investment Corp., to James and

others at their meeting in Chicago July 27, 1935;

The evidence shows that James, James and William M.

James, on July 27, 1935, purchased the investment, at James's office in

Chicago to discuss the proposed purchase of the newspaper by Skewes and Skinrood. At that meeting shortly after Skewes and Skinrood had introduced themselves, Skewes handed Layman a document asking for certain information about the paper. The information requested that Skewes and Skinrood be given the "Gross income each year for the last five years ending December 31, 1935, or at the close of the fiscal year - 'broken down' into income from the departments as follows: (a) Local Advertising (b) National Advertising (c) Circulation (d) Commercial Printing (e) Miscellaneous"; the cost of production per year after allowing all deductions for depreciation, interest and other charges for the last 5 years; the net profit per year for the last 5 years; certified audit of the business; certified balance sheet and other matters.

The evidence shows the request was refused and the information called for in the document was never given to Skewes and Skinrood. But at that meeting Layman handed Skewes what was designated a "monthly profit and loss summary" of the newspaper from January to June, 1936, which is in the record. It gives the income for each of the 6 months, broken down, also gives the departmental expenses and shows a net profit from the newspaper of \$3,093.94, and a net profit of \$7,162.32 from the job printing department, or a total "Net Profit - All Departments *** \$10,256.26." At the same time Layman handed Skewes and Skinrood a balance sheet of the business of the Evanston News Index which was part of an audit that had been prepared by Layman. The testimony as to what was said by the three men at that meeting is in sharp conflict on many points. Layman's testimony is to the effect that when Skewes presented him his written request for specific information about the newspaper, as above mentioned, he

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Chicago to discuss the proposed purchase of the newspaper by
Keweenaw and Skirwood. At that meeting several other persons and
Skirwood had introduced several other persons. The group
went asking for certain information about the paper. The in-
formation requested that Keweenaw and Skirwood be given the "gross
income each year for the last five years ending December 31,
1925, or at the close of the fiscal year - broken down into
income from the department as follows: (a) local advertising
(b) national advertising (c) circulation (d) commercial printing
(e) miscellaneous; the cost of production per year after deduct-
ing all deductions for depreciation, interest and other charges
for the last 5 years; the net profit per year for the last 5
years; certified audit of the business; certified balance sheet
and other matters.

The evidence shows the request was refused and the in-
formation called for in the document was never given to Keweenaw
and Skirwood. At that meeting several persons stated that the
document was a "monthly profit and loss statement" of the newspaper
from January to June, 1925, which is in the record. It gives
the income for each of the 6 months, broken down, also gives the
departmental expenses and shows a net profit from the department
of \$3,092.04, and a net profit of \$7,125.00 from the job printing
department, or a total net profit - all departments -

\$10,217.04. At the same time several persons stated that the
document was a balance sheet of the business of the Keweenaw News and that it
was part of an audit that had been prepared by Keweenaw. The docu-
ment as to what was said by the group was at that meeting is in
Keweenaw's testimony on many points. Keweenaw's testimony is to the
effect that when Keweenaw presented his list of questions to the
specific information about the newspaper, as above mentioned, he

told Mr. Skewes they might just as well stop talking about the sale because they were not going to deal with Skewes and Skinrood on the basis of profits earned by the paper for the past 5 years. That "All we have to offer you is a plant and an opportunity in the city of Evanston. You may use the appraisal, you may form your own opinions as to the value of the property and the potential development of which the field is capable." Mr. Skewes replied that if he was not to be given the information requested there ought to be some concession made in the price; that he did not believe the plant was worth \$250,000 which Slane was asking for it at the time, unless Skewes was shown some profits. At that time Layman told Skewes he would have to talk with Mr. Slane on that point.

Layman further testified that at that time he handed Skewes and Skinrood the six months' profit and loss summary and the balance sheet. That he explained to Skewes and Skinrood that the figures on the profit and loss summary were prepared "monthly on a budget basis" and no attempt had been made to adjust accurately such things as bad debts, taxes, etc., and that Skewes said: "I have got to find some other basis for determining the value" of the plant. That thereupon Layman produced the balance sheet or audit which was attached to the profit and loss statement. The testimony of Layman, as to what he said at the time in reference to the profit and loss statement, is denied by Skewes and Skinrood, and they testified, that Layman said the business of the newspaper had run down under the Dawes regime but Slane had built it up so as to break even for 1934 and 1935 and had made a net profit of \$10,000 for the first six months of 1936.

The evidence further shows that at the conclusion of the meeting in Layman's office in Chicago, the parties went to the

newspaper plant in Evanston and inspected the plant. Four days after this meeting Mr. Skewes wrote a letter to Layman in which he referred to the meeting of July 23, stated they had endeavored to analyze the figures submitted at the meeting by Layman and "We feel that the volume of business, as well as the value of building and equipment seem to justify further due consideration.

"Hence, despite the somewhat hazardous nature of the field, as well as the apparent paucity of profit, we are very frankly interested in the prospects." That when he returned from California about September 1st "at which time we understand your principal [Slane] will be in Chicago" and submit a definite proposition; that any proposal would naturally be based upon the building and appliances "in the replacement sum of \$69,936 submitted by the Printers Appraisal Company of Chicago under date of November 1, 1934; also appraisal of equipment in the replacement value of \$226,736, by the same appraisal company, under date of October 6, 1934; also latest certified balance sheet and certified operating statements of the business, *** covering the past few years." The letter continued that in view of what was said Skewes would like to have a "Certified comparative operating statement" of the newspaper and job departments for the past 2 calendar years and for the 7 months of the current year; certified balance sheet as of July 31, 1936; break down of payments made to July 31 of interest and principal on the mortgage indebtedness; the assessed valuation and annual taxes paid; and further requested "Advertising production cost as well as selling price, per inch, for the last two calendar years and the first seven months of this year." That he would be grateful if they would mail the information to him so as to reach him in Los Angeles before August 18. The letter continued saying that as Layman

never been lost in London and included the plant. Some days after this meeting Mr. Brown wrote a letter to Lyman in which he referred to the meeting of July 23, stated they had agreed to analyze the figures submitted at the meeting by Lyman and "we feel that the volume of business, as well as the value of building and equipment seem to justify further investigation."

"Hence, despite the somewhat hazardous nature of the field, as well as the apparent paucity of profit, we are very frankly interested in the prospects." This was the return from California about September 1st at which time we understood your principal [Lyman] will be in Chicago, and would a definite proposition; that any proposal would naturally be based upon the building and equipment "in the replacement sum of \$10,000 and- mitted by the Printers & Special Company of Chicago and a date of November 1, 1934; also acquisition of equipment in the replacement value of \$20,000, of the same special company, under date of October 8, 1934; also latest certified balance sheet and certified operating statements of the business, "we covering the past few years." The latter contained that in view of what was said Brown would like to have a "critical comparative operating statement" of the newspaper and job department for the past 12 calendar years and for the 7 months of the current year; certified balance sheet as of July 31, 1934; break down of payments made to July 31 of interest and principal on the mortgage indebtedness; the assessed valuation and annual taxes paid; and further requested "advertising production cost as well as selling price, per inch, for the last two calendar years and the first seven months of this year." That he would be grateful if they would call the information to him so as to reach him in Los Angeles before August 18. The letter continued saying that as Lyman

knew, Skewes owned several newspaper properties and that he intended to put them under the management of Mr. Skinrood, who was an able newspaper man of some quarter of a century of metropolitan experience, and asked that a copy of the information requested, be sent to Mr. Skinrood, who lived in Milwaukee; that the information would be treated confidentially and "Mr. Skinrood will return the appraisals to you within the next few days;" that Mr. Skewes would endeavor to return the audit for 1935 and the operating statement for the first six months of 1936 within the next ten days.

Four days later, July 31, Layman replied to this letter addressing Mr. Skewes at Los Angeles, stating, "I have sent the owner of the paper [Slane] a copy of your letter, which he should receive in Miami, Florida, by the end of this week;" that Layman had given a favorable account to Mr. Slane of both Mr. Skewes and Skinrood, and continuing: "Today I received a letter from Mr. Skinrood, and the copies of the appraisal which I loaned to him. I suppose he has not finished with the copies of the audits, which I gave him, as he did not return them.

"We should be glad, of course, to give you any information which may be pertinent to the transaction under consideration. You should understand, however, that the principal thing we have to offer is a plant and an 'opportunity.' You will not purchase the property on a basis of its recent earning record, for, frankly, the property is not for sale on such a basis. The value of the property is found in the field itself, and in the possible development of which the field is capable." The letter concludes by stating that he enclosed a copy of a letter which he (Layman) had written to Mr. Skinrood in reply to Mr. Skinrood's letter of July 30.

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that, I have noted several newspaper articles and that he intended to put them under the management of Mr. Skirwood, who was an able newspaper man of some quarter of a century of newspaper experience, and asked that a copy of the information requested, be sent to Mr. Skirwood, who lived in Milwaukee; that the information could be trusted confidentially and that Skirwood will return the materials to you within the next few days; that Mr. Skirwood would endeavor to return the materials for use and the operating statement for the first six months of 1933 within the next few days.

Your day letter, July 21, Layman replied to this letter addressing Mr. Skirwood at Los Angeles, stating, "I have sent the owner of the paper [Skirwood] a copy of your letter, which he should receive in Miami, Florida, by the end of this week; that Layman had given a favorable account to Mr. Skirwood of both Mr. Skirwood and Skirwood, and continuing: "Today I received a letter from Mr. Skirwood, and the copies of the material which I turned to him. I suppose he has not finished with the copies of the material, which I gave him, as he did not return them.

"I should be glad, of course, to give you any information which may be pertinent to the transaction under consideration. For Skirwood understands, however, that the situation is not as clear as it is a point and an opportunity. You will not purchase the property on a basis of its present value, but, frankly, the property is not for sale on such a basis. The value of the property is found in the fact itself, and in the possible development of which the field is capable." The letter concluded by stating that he enclosed a copy of a letter which he (Layman) had written to Mr. Skirwood in reply to Mr. Skirwood's letter of July 21.

July 30, 1936, Mr. Skinrood wrote Mr. Layman: "I am returning herewith by parcel post the two volumes on valuations of the Evanston property that we investigated recently;" and thanked Layman and the employees of the newspaper for the courtesies shown him on the recent visit to the plant. "Your frankness and your willingness to give us all the facts so far as they could be ascertained provide exactly the basis on which a business deal can be negotiated. We would not buy this or any other property without the most careful investigation and it is a pleasure to deal with parties who give every evidence of fair and above board practices and standards.

"We are interested in buying the Index and propose to make an offer when the owner gets back to Chicago." The letter then refers to Mr. Skewes as a substantial business man and continues: "The profits of the Index now appear to be almost negligible and I feel certain that only the most careful and scrupulous attention to details of management by owners who are highly familiar with newspaper making, will suffice to turn your present gross into an appreciable net profit. In other words it is a lot easier to lose money in that field than to make it. ***

"I may have some more questions for you in a few days as there [are] some points that we are not quite clear on as yet."

On the trial plaintiffs called a certified public accountant who gave testimony analyzing the profit and loss statement for the first 6 months of 1936 and testified that it showed a net loss of \$121.86 instead of a net profit of \$10,256.26.

Complaining of the balance sheet submitted by Layman at the meeting July 23, 1936, in Chicago, counsel for plaintiffs say that Layman said the balance sheet reflected the condition of the business of the newspaper for the year ending December 31, 1935.

Plaintiffs called Mr. Mahone, a certified public accountant and Professor Himmelblau, of Northwestern University, who testified criticizing the make up of the balance sheet; that one item on the asset side of the balance sheet under the caption "Net Book Value, \$30,000" of the land "should not have been set up under the caption 'Net Book Value,' but should have been set up under the caption 'Cost as of the date of acquisition by the corporation.'" That the actual cost of the land was \$7,487.50, as shown by the private journal of the Lake Shore Index, which was written up by Layman to \$30,000, which Layman admitted. Professor Himmelblau testified that the item in the balance sheet entitled "Circulation Structure" as having a value of \$40,000 "should have been shown in the balance sheet at the cost of the circulation structure as of the date on which the Evanston News Index acquired the newspaper." That another falsity of the balance sheet was that it showed under the heading "Long Term Obligations," 6% Registered 20-year Debenture Notes, \$100,000. "Long Term Note (due 1945), \$50,000," and counsel say that "after Slane had purchased the newspaper in 1934, *** Layman made the entries above quoted on the private ledger of the Evanston News Index, to which ledger only Layman and Slane had access." That Skewes and Skinrood asked Layman at the meeting of July 23, 1936, what these two items meant and he told them they "represented money which Slane had invested in the corporation either as working capital, expense of operation or part of the purchase price, *** represent actual investment on the part of Mr. Slane." Counsel continuing say Layman testified under cross-examination that his recollection was that Slane had obtained an option to purchase the newspaper from the Dawes interests for \$125,000, and that Slane sold this option to the new corporation for \$100,000

plaintiffs called Mr. Hanson, a certified public accountant and
 Professor Hisselman, of Northwestern University, who testified
 criticizing the entry on the balance sheet; that the item on
 the asset side of the balance sheet under the caption "Land" was
 value, \$30,000 of the land "should not have been set up under
 the caption 'Net Book Value', but should have been set up under
 the caption 'Cost as of the date of acquisition of the prop-
 erty'." That the actual cost of the land was \$7,400, \$5,000, as
 shown by the private journal of the land shore entry, being the
 written up by Layman to \$50,000, which Layman admitted. That
 not Hisselman testified that the item in the balance sheet
 entitled "Accumulated Depreciation" at having a value of \$50,000
 "should have been shown in the balance sheet at the cost of the
 circulation structure as of the date on which the structure was
 index acquired the newspaper." That another falsity of the
 balance sheet was that it showed under the heading "Long Term
 Obligations," \$5,000,000 20-year mortgage bonds, \$100,000,
 "Long Term Note (due 1925)," \$50,000, and showed that "Layman
 Hisselman had purchased the newspaper in 1924, 1925, 1926, 1927, 1928, 1929,
 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941,
 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953,
 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965,
 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977,
 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989,
 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001,
 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013,
 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025,
 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037,
 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049,
 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061,
 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073,
 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085,
 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097,
 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109,
 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121,
 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133,
 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145,
 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157,
 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169,
 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181,
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and was paid the \$100,000, by delivery to him of the long term note for \$50,000 and \$50,000 of the Registered Debenture Notes. The argument is that the information furnished plaintiffs as to the value of the newspaper plant was false and fraudulent, having been greatly inflated, and that such facts were carefully concealed by Layman at the July 23, 1936 meeting when the matter of the purchase and sale was first discussed.

(4) As to the claimed "Circulation fraud":

Counsel for plaintiffs contend that for over a year prior to the blind advertisement of March 7, 1936, Slane had been building up a false belief in the public mind as to the circulation of the newspaper through his false statements to the Post Office Department and through a statement by him to "Standard Rate and Data" a trade publication of high standing and reliability in the newspaper world; that prior to January 25, 1936, Slane, in compliance with the postal requirements, sent to the Post Office Department an affidavit sworn to by him stating the average daily net paid circulation of the newspaper for the year ending December 31, 1935, to be 5396; that Skewes read this statement in the "Editor and Publisher"; that "Slane's 'ABC' books of the Evanston News Index, Inc., as the circulation books are called, *** show that the circulation of the newspaper for that year, instead of being 5396 was 3290;" that after April 1, 1936, Slane sent another standard trade publication a sworn statement stating the average daily net paid circulation of the paper for 6 months prior to April 1, 1936 was 6389; that Skewes read this statement in August, 1936, but that Slane's "ABC" books showed the circulation during that time was but 3416; that October 7, 1936, Slane swore to a statement which he sent to the United States Post Office Department stating that the average daily net

and was paid for \$100,000, by delivery to him of the same amount in the form of \$100,000 and \$20,000 of the registered currency notes. The amount is not the information furnished to him as to the value of the newspaper that was taken and transferred, having been greatly inflated, and that such facts were carefully concealed by him at the time of the delivery of the notes of the purchase and sale was first disclosed.

(4) As to the alleged "circulation figures":

Journal for Plaintiff's content that for over a year prior to the blind advertisement of March 7, 1935, there had been building up a false belief in the public mind as to the circulation of the newspaper through his false statements to the Post Office Department and through a statement by him in "Trade and Rate and Data", a trade publication of high standing and responsibility in the newspaper world; that prior to January 22, 1935, in compliance with the postal requirements, and to the Post Office Department an affidavit sworn to by him stating the average daily net paid circulation of the newspaper for the year ending December 31, 1934, to be 3000; that when that this statement in the "Editor and Publisher"; that "Liana's" books are of the circulation was in fact, Inc., as the circulation books are called, *** show that the circulation of the newspaper for that year, instead of being 3000 was 1200; that after April 1, 1935, Liana sent another similar trade publication a sworn statement stating the average daily net paid circulation of the paper for 6 months prior to April 1, 1935 was 2000; that when that this statement in August, 1935, that "Liana's" books showed the circulation during that time was not 2000; that October 7, 1935, Liana swore to a statement which he sent to the United States Post Office Department stating that the average daily net

paid circulation for the 6 months' period prior to September 30, 1936, was 5407, but Slane's "ABC" books showed the circulation to be 3299. That during the conference between plaintiffs and Slane at the Stevens Hotel in Chicago, Slane stated that the public affidavits as to the circulation should be increased 1,000. This was denied by Slane. The "ABC" books are personal books kept by the publisher.

Plaintiffs' counsel say they were defrauded because of such misrepresentations by defendants. On the other side, counsel for defendants say: "there appears to be a large flexibility amongst individual newspaper publishers as to what shall or shall not be included in counting net paid circulation and it is a practice of small newspapers to include in their post office statement (or so-called publisher's affidavit) newspapers that they mail out or distribute that have not been paid for, but which they expect will be, prepaid subscribers who have temporarily discontinued delivery of their newspaper and various other types of subscribers. Hence, the publisher of a small newspaper may honestly represent in a post office affidavit a larger figure of net paid circulation than that which would be conceded by the standards promulgated by Audit Bureau of Circulation." And counsel say this custom is sustained by the testimony of the witness Bradley, western manager of a publishers' representative agency, and by Slane's secretary, a newspaper woman of long experience.

(5) As to the rebate fraud claimed by plaintiffs:

The evidence shows that for some time prior to the sale defendants were paying rebates to two large advertisers who had businesses in Evanston and that Slane had represented at the meeting in September, 1936, that there were no rebates paid to advertisers. Slane denied making any such representation but on

kind circulation for the 6 months' period prior to September 1936, was 507, but since the circulation was 307. That during the conference between plaintiffs and Lane at the Stevens Hotel in Chicago, Lane stated that the public affidavit as to the circulation should be increased 1,000. This was denied by Lane. The "ABC" books are personal books kept by the publisher.

Plaintiffs' counsel say they were attended to by Lane which misrepresentations by defendant. On the other side, counsel for defendant say: "There appears to be a large flexibility amongst individual newspaper publishers as to what shall be counted not be included in counting but said circulation and it is a practice of small newspapers to include in their own office statement (or so-called publisher's affidavit) newspapers that they call out or distribute but have not been paid for, but which they expect will be, prepaid subscribers and have entirely discontinued delivery of their newspapers and various other types of subscribers. Hence, the publisher of a small newspaper may honestly represent in a post office affidavit a larger figure of net paid circulation than that which would be conceded by the standards promulgated by the United States of circulation." and counsel say this custom is justified by the testimony of the witness, briefly, witness manager of a publisher, representative of the and by Lane's secretary, a newspaper woman of long experience.

(5) As to the rebate fund claimed by plaintiffs: The evidence shows that for some time prior to the sale defendants were paying rebates to two large advertising agencies in Evanston and that Lane had represented at the meeting in September, 1936, that there were no rebates paid to advertisers. Lane denied making any such representation but on

the contrary testified he disclosed that rebates had been paid to the two Evanston advertisers.

Plaintiffs' evidence is that they discovered about November, 1936, a month after they bought the newspaper plant, that rebates were being paid to the two Evanston advertisers and the number of subscribers was not as they claim Slane represented but was much less. That the actual circulation figures were as above stated.

Although plaintiffs had discovered the claimed misrepresentations in November, 1936, they made no complaint to defendants, but on the contrary paid the \$25,000 note due January 15, 1937 and made monthly payments thereafter until July 1, 1938, a period of more than 20 months. In these circumstances we think they ought not now be permitted to say that on account of these two claimed misrepresentations they have the right, about 20 months after the discovery, to insist such misrepresentations authorize them to rescind the purchase of the newspaper plant. Campbell v. Fleming, 28 English Law Reports (1 A & E) 44; Taylor v. Short, 107 Mo. 384; Greenwood v. Fenn, 136 Ill. 146.

Counsel for defendants contend that "Having discovered two incidents of an alleged fraud and having elected to ratify and affirm the contract, the right to rescission is permanently waived and is not revived by subsequent discovery of another incident of the alleged fraud," citing the Campbell, Taylor and Greenwood cases, while on the other side counsel for plaintiffs' position is that "Where at the time of the sale the seller has made a number of false representations regarding different elements of the property sold, and the buyer learns of their falsity on varying dates, respectively, subsequent to the purchase, there can be no ratification by him of the fraudulent transaction until

the time when he has made his discovery of the falsity of every representation. Skewes and Skinrood could not ratify until they had full knowledge of ALL the fraud practiced upon them, which full knowledge they did not obtain until July 22, 1938, eleven days before they filed their complaint for rescission." In support of this counsel cite Pierce v. Wilson, 34 Ala. 596; Voorhees v. Campbell, 275 Ill. 292; Foston v. Swanson, 306 Ill. 518, and other authorities,

Upon a consideration of all the authorities cited on this question and upon further investigation, such as we had time to make, we are of opinion no hard and fast rule can be laid down that will fit all cases, but the facts in each case must be considered and the "rule of reason" applied. Standard Oil Co. of N. J. v. U. S., 221 U. S. 1; Comm. Building Corp. v. Hirschfield, 307 Ill. App. 533.

As stated, the master made specific findings that defendants were guilty of no fraud which induced plaintiffs to purchase the newspaper plant. It must be borne in mind that Mr. Skewes was a newspaper man of 25 years' experience and had had wide experience in other businesses, he testified: "I have been engaged in the newspaper business, directly or indirectly, for 25 or 30 years. Now I am connected, either as owner publisher, or otherwise, with a number of newspapers. There is the Meridian, Mississippi, Star, the Laurel, Mississippi Daily Leader, Crowell, Louisiana, Daily Signal, the Peru, Illinois Daily News Herald, and the Evanston, Illinois Daily News Index. *** I was managing editor of the Milwaukee Daily News from 1914 to 1917; publisher of the Danville, Illinois Press 1918 to 1922. I am editor and owner, at this time, of the Meridian Mississippi Star and have been since 1922. I am president of the Laurel, Mississippi

Daily Leader. I am a director of the Merchants and Farmers Bank of Meridian. I am a director also of the Mississippi Development Board and have been a director of the Mississippi Press Association, and am now director of the Southern Newspaper Publishers Association," and continuing, he designated other important positions he held. He testified further: "My experience has brought me in contact with every phase of the newspaper business and that includes accounting systems for newspapers in a layman's sense. I have hired and retained accountants and auditors. I have installed accounting systems. In addition to the newspapers I have mentioned, I have also bought and sold the Lincoln, Illinois Star, the Perry, Oklahoma Daily Journal, the Blytheville, Arkansas Courier, the Litchfield, Illinois News Herald, and the Danville, Illinois Morning Press. I have purchased a weekly newspaper in Chicago Heights. I sold it to a gentleman by the name of Spencer. In the purchase and sale of newspapers there have been repeated instances where I have had to examine book-keeping figures concerning those various organizations."

In discussing the rule of law applicable to a case where the witnesses appear before the master and his findings are approved by the chancellor we cited and discussed the authorities in Phillips v. WGN, 307 Ill. App. 1. We there cited and quoted from the case of Smuk v. Hryniewiecki, 369 Ill. 546, the latest case in which our Supreme court had then expressed an opinion on the question. In that case the court said: "Where the master's findings have been approved by the chancellor we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence." We there [in the Phillips case] pointed out there were other cases holding this was not a correct statement of the law. In the instant case, upon a consideration

of all the evidence we are of opinion whichever rule is applied, the decree which finds there was no fraud must be affirmed.

We might add, however, that all that was said and done by Layman and Slane in the negotiations and sale of the property is not to be approved but we are of opinion that the manner in which business has been conducted since the "time whereof the memory of man runs not to the contrary" the law applied to the facts in the instant case does not afford plaintiffs a remedy. Wemple State Bank v. Cont. Ill. Co., 279 Ill. App. 224.

Complaint is made to fees allowed to the master. The master's fees were taxed at \$8,067.80; \$4,000 of this had been paid during the hearing pursuant to an order entered on motion of defendant Lake Shore Index, Inc., and by agreement of all parties, December 16, 1939. The order recited that \$2,000 had been paid the master pursuant to an order May 9, 1939, and it was ordered that \$2,000 more be paid to him. After the report of the master was filed, June 12, 1940, the master filed his petition June 26, 1940, and prayed that allowance be made to him for services rendered. He reported he had taken 35,452 folios of oral and documentary evidence at 15 cents per folio, \$5,317.80, and that he had performed 400 hours of service, hearing, etc., for which he asked \$4,000, or a total of \$9,317.80. From this amount credit was given by him of \$4,000, leaving a claimed balance of \$5,317.80. The court reduced the \$4,000 request for the hearings, \$1250, allowed the master \$2750 for this item, and ordered that the total fees of the master be allowed for \$8067.80, leaving a balance which after crediting the \$4,000 is \$4,067.80.

Counsel for plaintiffs contend the fees allowed were excessive "because the Master had charged on a folio basis as well as a per diem basis for the same services, and that he had also

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of all the evidence we are of opinion whatever rule is applied,
the decree which finds there was no fraud must be affirmed.
We might add, however, that all that was said and done
by Layman and O'Neil in the negotiations and sale of the property
is not to be approved but we are of opinion that the manner in
which business has been conducted since the time when the
deceit of man runs not to the contrary, the law applied to the
facts in the instant case does not afford plaintiff a remedy.
People State Bank v. Cent. Ill. Co., 275 Ill. App. 3d 104.
Complaint is made to have allowed to the master. The
master's fees were taxed at \$1,267.50; \$1,000 of this had been
paid during the hearing pursuant to an order entered on motion
of defendant Lake Shore Bank, Inc., and by agreement of all
parties, December 16, 1937. The order recited that \$1,000 had
been paid the master pursuant to an order May 9, 1935, and it was
ordered that \$1,000 more be paid to him. After the report of the
master was filed, June 12, 1940, the master filed his petition
June 23, 1940, and prayed that allowance be made to him for ser-
vices rendered. He reported he had taken \$1,267.50 balance of oral
and documentary evidence at 15 cents per folio, \$1,217.50, and
that he had questioned and heard of service, hearing, etc., for
which he asked \$1,000, or a total of \$2,217.50. From this amount
credit was given by him of \$1,000, leaving a claimed balance of
\$1,217.50. The court reduced the fee to \$1,000 for the hear-
ing, \$150, allowed the master \$700 for this item, and ordered
that the total fees of the master be allowed for \$1,850.00, less
the balance which after crediting the \$1,000 is \$850.00.
Grounds for plaintiff's contention that fees allowed were
excessive because the Master had charged on a folio basis as well
as a per folio basis for the same services, and that he had also

charged on a folio basis for two trade magazines, 'Editor and Publisher' and 'Standard Rate and Data,' of which only five pages were introduced in evidence." Counsel say "The Master has charged and the court has allowed him the fee of \$1000 based upon the finding of the court that both of said magazines of several hundred pages each were received in evidence." Just how the \$1000 was arrived at by counsel we are not advised. Counsel further contend that on the hearing before Judge Lupe who entered the final order allowing the master's fees, above referred to, on which there is a balance due of \$4,067.80, "no evidence was introduced by the master to support his fees" and that "The order entered by Judge Lupe expressly finds that the transcript of the proceedings had before him on the question of Master's fees contains 'no evidence' but only argument of counsel and remarks of the court.'" This argument is not borne out by the record. The record discloses that February 10, 1941, Judge Lupe entered an order which recited that, on motion of attorneys for Skewes and Skinrood to certify a transcript of proceedings had before the court June 25, 1940, "this court having examined said transcript and having heard argument of the respective counsel, finds that said transcript does not constitute a report of proceedings and contains no evidence but only argument of counsel and remarks of the court." And it was ordered that the motion to certify the transcript be denied. This order does not show that no evidence was heard June 25, 1940 when the court fixed the fees but merely recites that what was presented as a transcript of that proceeding contained no evidence but only argument of counsel and the remarks of the court, and apparently for this reason, the court refused to certify it. The objection to the master's fees cannot be sustained.

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charged on a table basis for two weeks beginning, 'The master was
 'The master was' and 'The master was' of which only five pages
 were introduced in evidence. 'The master was' 'The master was'
 charged and the court has allowed him the fee of \$1000 based
 upon the finding of the court that both of said masters of
 several hundred pages each were received in evidence. That
 how the \$1000 was arrived at by counsel we are not advised.
 Counsel further contends that on the hearing before Judge
 and entered the final order allowing the master's fees, above
 referred to, on which there is a balance due of \$1,000.00, and
 evidence was introduced by the master to support his fees, and
 that "The order entered by Judge Lugo expressly finds that the
 transcript of the proceedings had before him on the question of
 Master's fees contains 'no evidence' but only a statement of counsel
 and remarks of the court." This argument is not borne out by
 the record. The record discloses that between 10, 1931, Judge
 Lugo entered an order which recited that, on motion of counsel
 for James and Skinnod to certify a transcript of proceedings
 had before the court June 11, 1931, "this court having examined
 said transcript and having found a statement of the proceedings before
 said, finds that said transcript does not constitute a report of
 proceedings and contains no evidence but only a statement of counsel
 and remarks of the court." and it was ordered that the motion
 to certify the transcript be denied. This order does not state
 that no evidence was heard June 10, 1931 when the court found
 the fees but merely recites that there was presented as a statement
 of that proceedings contained no evidence but only a statement
 of counsel and the remarks of the court, and accordingly for this
 reason, the court refused to certify it. The objection to the
 master's fees cannot be sustained.

Two further points are made by counsel for plaintiffs, (1) that "A motion of a defendant for a rule upon the plaintiff to give security for costs must be made at the defendant's earliest opportunity after the suit has been filed," and (2) that the judge of the Superior court fixed the supersedeas bond at \$175,000 and was therefore guilty of an abuse of discretion. We are unable to see how either of these points is involved in the matter before us.

For the reasons stated, the decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

Two further points are made by counsel for Plaintiff, (1) that a motion of a defendant for a trial upon the Plaintiff to give testimony for cause must be made at the defendant's earliest opportunity after the suit has been filed, and (2) that the judge of the Superior Court fixed the appropriate bond of \$125,000 was therefore guilty of an abuse of discretion. We are unable to see how either of those points is involved in the matter before us.

For the reasons stated, the decree of the Superior Court of Cook County is affirmed.

ROBERT H. HARRIS,

Attorney, P. J. and Ketchett, L. J. counsel.

41495

STANLEY H. DOGGETT,
Appellee,

v.

NORTH AMERICAN LIFE INSURANCE
COMPANY OF CHICAGO, a corpora-
tion, E. S. ASHBROOK and W. O.
MORRIS,

Appellants.

78
APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

166
314 I.A. 193

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A petition for a writ of mandamus to compel North American Life Insurance Company of Chicago, its president, E. S. Ashbrook, and its secretary, W. O. Morris, to permit the petitioner, or his agents and attorneys, to inspect and examine the list of names of the stockholders of said corporation, the record of their addresses and the number of shares of stock held by them, and to make extracts therefrom. The case was tried by the court without a jury. A judgment order was entered awarding a writ of mandamus and assessing a penalty of \$288.33 against each of the respondents "for failure of the respondents to permit the petitioner to examine the record of shareholders for a proper purpose." Respondents appeal from the judgment order.

The petitioner, living in South Grange, New Jersey, in 1932 acquired, through inheritance, 1,150 shares of a total outstanding issue of 250,000 shares of the capital stock of respondent Insurance Company. The Insurance Company paid dividends continuously from 1917 to 1932, inclusive. When the depression came the company ceased to pay dividends.

A number of contentions are raised by respondents in support of their claim that the instant judgment order should be set aside. In our view of this appeal we need notice only one of the contentions raised. Respondents strenuously contended in the trial/court that the petitioner, in seeking to inspect the list

STANLEY H. DOGGERT,
Appellee,

v.

NORTH AMERICAN LIFE INSURANCE
COMPANY OF CHICAGO, a corpora-
tion, E. S. ASHBROOK and W. O.
MORRIS,
Appellants.

APPEAL FROM JUDGMENT
COURT OF COOK COUNTY.

3141A.193

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

A petition for a writ of mandamus to compel North American Life Insurance Company of Chicago, its president, E. S. Ashbrook, and its secretary, W. O. Morris, to permit the petitioner, or his agents and attorneys, to inspect and examine the list of names of the stockholders of said corporation, the record of their addresses and the number of shares of stock held by them, and to make extracts therefrom. The case was tried by the court without a jury. A judgment entry was entered awarding a writ of mandamus and assessing a penalty of \$288.33 against each of the respondents "for failure of the respondents to permit the petitioner to examine the record of their shareholders for a proper purpose." Respondents appeal from the judgment order.

The petitioner, living in South Orange, New Jersey, in 1932 acquired, through inheritance, 1,150 shares of a total outstanding issue of 250,000 shares of the capital stock of respondent Insurance Company. The Insurance Company paid dividends continuously from 1917 to 1932, inclusive, when the depression came the company ceased to pay dividends.

A number of contentions are raised by respondents in support of their claim that the instant judgment order should be set aside. In our view of this appeal we need notice only one of the contentions raised. Respondents strenuously contended in the trial that the petitioner, in seeking to inspect the list

of stockholders, was not acting in good faith and for the purpose of protecting the stockholders' interests, but to annoy and harass the corporation and for purposes detrimental to the best interests of the stockholders and the company. Undoubtedly, certain evidence introduced by respondents tended to support this contention. The petitioner introduced evidence tending to prove that the purposes were proper. But respondents contend that the trial court erred in excluding important evidence offered by them that would tend to prove their theory of fact as to the motive behind the action of petitioner in seeking a list of stockholders. This contention is a meritorious one. It appears that George E. Tribble, a stockholder of respondent company, brought suit against the company, its officers and directors, in the Circuit court of Cook county, in which Tribble asked, inter alia, that the election of the then board of directors of the company be declared invalid, and that he be given the right to examine the books and records of the company. It further appears that less than sixty days after Tribble acquired considerable stock in the company he brought the suit in question. During the cross-examination of petitioner, Doggett, he admitted that he was acquainted with Tribble; that they had collaborated in the solicitation of proxies from stockholders in respondent Insurance Company; that Tribble had agreed to go along with the stockholders' committee, formed by petitioner, to bring about the election of directors in the company. He testified that "there is a community of purpose between myself and Mr. Tribble in connection with the affairs of the company. Our desires are exactly alike as stockholders." The following question was asked petitioner: "Mr. Rooney [attorney for respondents]: Have you any agreement with Mr. Tribble in the event you are successful as to who shall become officers of the company? * * * The Witness: I have discussed it with Mr. Tribble. Not being an insurance man, naturally, when you look to the possibilities of replacement you

of stockholders, was not acting in good faith and for the purpose of protecting the stockholders' interests, but to harass and harass the corporation and for purposes detrimental to the best interests of the stockholders and the company. Undoubtedly, certain evidence introduced by respondents tended to support this contention. The petitioner introduced evidence tending to prove that the purposes were proper. But respondents contend that the trial court erred in excluding important evidence offered by them that would tend to prove their theory of fact as to the motive behind the action of petitioner in seeking a list of stockholders. This contention is a meritless one. It appears that George E. Tribble, a stockholder of respondent company, brought suit against the company, its officers and directors, in the Circuit Court of Cook County, in which Tribble asked, inter alia, that the election of the then board of directors of the company be declared invalid, and that he be given the right to examine the books and records of the company. It further appears that less than sixty days after Tribble acquired considerable stock in the company he brought the suit in question. During the cross-examination of petitioner, Dorett, he admitted that he was acquainted with Tribble; that they had collaborated in the solicitation of proxies from stockholders in respondent Insurance Company; that Tribble had agreed to go along with the stockholders' committee, formed by petitioner, to bring about the election of directors in the company. He testified that "there is a conspiracy of purpose between myself and Mr. Tribble in connection with the affairs of the company. Our desires are exactly alike as stockholders." The following question was asked petitioner: "Mr. [counsel] for respondents: Have you any agreement with Mr. Tribble in the event you are successful as to who shall become officers of the company? * * * The witness: I have discussed it with Mr. Tribble. Not being an insurance man,

have to be prepared to have the right men to do it, and I figure that he is qualified to help in that direction." He further testified that after he had read the complaint by Tribble against the Insurance Company he, Doggett, addressed a letter to certain stockholders of the company in which he called their attention to the Tribble suit, and that the said suit "sets up, among other matters, the past losses of the company." Counsel for respondents made the following offer of proof: "That in November, 1939, Russell Matthias, an attorney in the firm of Ekern & Meyers at 1 North LaSalle Street, Chicago, went to Springfield, Illinois, in behalf of George E. Tribble of Baltimore, Maryland; that while there Mr. Matthias examined the records, including the charters and by-laws and other data pertinent to the North American Life Insurance Company which were on file in the office of the Director of Insurance; that the information then obtained is now being used as a basis for a suit filed by said George E. Tribble against the North American Life Insurance Company, its officers and directors, which is now pending in the Circuit Court of Cook County as case No. 40 C 203; that the suit is seeking, among other things, to declare invalid the election of the present Board of Directors of said Company and to obtain the right to examine the books and records of said Company." Petitioner's objection to the offer was sustained. Counsel for respondents then made the following offer: "Now, I make a further offer of proof of the testimony of David J. Kadyk with the law firm of Lord, Bissell & Kadyk, 135 South LaSalle Street; that in the last week of December, 1939, Mr. Kadyk received a telephone call from Mr. Erwin A. Meyers of the firm of Ekern & Meyers, 1 North LaSalle Street, Chicago; that Mr. Meyers in that conversation stated he represented Mr. George E. Tribble of Baltimore, Maryland; that he would like to arrange a conference; and following that conversation, on December 29, 1939, Mr. Kadyk went to the office of Ekern & Meyers and there had a conference

have to be prepared to have the right men to do it, and I think that he is qualified to help in that direction." He further testified that after he had read the complaint by Triple against the Insurance Company he, Doggett, addressed a letter to certain stockholders of the company in which he called their attention to the Triple suit, and that the said suit "sets up, among other matters, the past losses of the company." Counsel for respondents made the following offer of proof: "That in November, 1939, Marshall Mathias, an attorney in the firm of Kern & Meyers at 1 North LaSalle Street, Chicago, went to Springfield, Illinois, in behalf of George W. Triple of Baltimore, Maryland; that while there Mr. Mathias examined the records, including the checkers and by-laws and other data pertinent to the North American Life Insurance Company which were on file in the office of the Director of Insurance; that the information thus obtained is now being used as a basis for a suit filed by said George W. Triple against the North American Life Insurance Company, its officers and directors, which is now pending in the Circuit Court of Cook County as case No. 40 C 203; that the suit is seeking, among other things, to declare invalid the election of the present Board of Directors of said Company and to obtain the right to examine the books and records of said Company." Plaintiff's objection to the offer was sustained. Counsel for respondents then made the following offer: "Now, I make a further offer of proof of the testimony of said J. Kadyk with the last firm of Lord, Bissell & Kadyk, 137 North LaSalle Street; that in the last week of December, 1939, Mr. Kadyk received a telephone call from Mr. Edwin J. Meyers of the firm of Kern & Meyers, 1 North LaSalle Street, Chicago; that Mr. Meyers in that conversation stated he represented Mr. George W. Triple of Baltimore, Maryland; that he would like to arrange a conference and following that conversation, on December 29, 1939, Mr. Kadyk went to the office of Kern & Meyers and there had a conference

with Mr. Meyers, Mr. Luther F. Binkley and Mr. Russell Matthias; that Mr. Meyers then informed him that his client, Mr. Tribble, was the owner of about thirty to forty thousand shares of stock of the North American Life Insurance Company, that he controlled at least another thirty thousand shares and had access to about seventy thousand more; that unless the officers of the Company would agree at once to double the Board of Directors or, in other words, to increase it from nine to eighteen, the additional members of which were to be selected by his client, Mr. Tribble, and also to give Mr. Tribble an important position as an officer, either as President or Chairman of the Board or some similar position, and allow Mr. Tribble to pick one-half of the members of all key committees of the Company, that a suit would be filed at once contesting the validity of the election of the entire Board of Directors and asking to examine books and records of the Company and for a list of stockholders and other relief; that Mr. Kadyk then informed the gentlemen that the officers suggested Mr. Tribble come to Chicago for a conference; that this suggestion was never acted upon and that within a very short time thereafter a suit was filed; that Mr. Kadyk of the firm of Lord, Bissell & Kadyk and myself are attorneys of record in the suit mentioned. Mr. Hanley [attorney for petitioner]: I object to that testimony as being incompetent, irrelevant, and immaterial. The Court: I think so, objection sustained."

The offered evidence would tend strongly to support respondents' theory of fact that the petitioner and Tribble were engaged in a common purpose, to obtain partial or complete control of the management of respondent company, and therefore the acts and declarations of one were the acts and declarations of the other. The instant proceedings were commenced in the Superior court of Cook county. Later, Tribble commenced proceedings against the respondents in the Circuit court of Cook county. Respondents

with Mr. Myers, Mr. Linkley and Mr. Marshall; that Mr. Myers then informed him that his client, Mr. Tribble, was the owner of about thirty to forty thousand shares of stock of the North American Life Insurance Company, that he controlled at least another thirty thousand shares and had access to about seventy thousand more; that unless the officers of the Company would agree at once to double the Board of Directors or, in other words, to increase it from nine to eighteen, the additional members of which were to be selected by his client, Mr. Tribble, and also to give Mr. Tribble an important position as an officer, either as President or Chairman of the Board or some similar position, and allow Mr. Tribble to pick one-half of the members of all key committees of the Company, that a suit would be filed at once contesting the validity of the election of the entire Board of Directors and asking to examine books and records of the Company and for a list of stockholders and other relief; that Mr. Kadyk then informed the gentleman that the officers suggested Mr. Tribble come to Chicago for a conference; that this suggestion was never acted upon and that within a very short time thereafter a suit was filed; that Mr. Kadyk of the firm of Lord, Bissell & Kadyk and myself are attorneys of record in the suit mentioned, Mr. Hanley [attorney for petitioner]; I object to that testimony as being incompetent, irrelevant, and immaterial, the Court: I think so, objection sustained."

The offered evidence would tend strongly to support respondents' theory of fact that the petitioner and Tribble were engaged in a common purpose, to obtain partial or complete control of the management of respondent company, and therefore the acts and declarations of one were the acts and declarations of the other. The instant proceedings were commenced in the Superior Court of Cook County. Later, Tribble commenced proceedings against the respondents in the Circuit Court of Cook County. Respondents

claim that the starting of the second suit was a part of the common plan to harass the respondents and to force them to accede to Tribble's demands. If the petitioner in the instant suit is bound by the acts and declarations of Tribble, in furtherance of the common purpose, and we hold that he is so bound, then, if the respondents proved to the satisfaction of the trial court the alleged facts set up in their offer, a writ of mandamus should not be awarded in the instant case. Respondents further contend that the court erred in refusing to allow them to offer proof to the effect that certain statements of alleged facts made by petitioner in certain circulars he sent to stockholders soliciting their proxies, were false. If petitioner made misrepresentations of fact in his circulars, respondents had the right to show that fact, as the misrepresentations would bear upon the question of petitioner's good faith in seeking to inspect the list of stockholders.

For the guidance of the trial court should there be another trial of the instant proceedings, we may state that we do not agree with respondents' contention that a shareholder of a domestic life insurance company has no right, either at common law or by statute, to a list of shareholders, and that for that reason respondents' motion to strike the second amended petition should have been sustained and the suit dismissed.

The judgment order of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT ORDER REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

Sullivan and Friend, JJ., concur.

claim that the starting of the second suit was a part of the common plan to harass the respondents and to force them to accede to Tribble's demands. If the petitioner in the instant suit is bound by the acts and declarations of Tribble, in furtherance of the common purpose, and we hold that he is so bound, then, if the respondents proved to the satisfaction of the trial court the alleged facts set up in their offer, a writ of mandamus should not be awarded in the instant case. Respondents further contend that the court erred in refusing to allow them to offer proof to the effect that certain statements of alleged facts made by petitioner in certain circulars he sent to stockholders soliciting their proxies, were false. If petitioner made misrepresentations of fact in his circulars, respondents had the right to show that fact, as the misrepresentations would bear upon the question of petitioner's good faith in asking to inspect the list of stockholders.

For the guidance of the trial court should there be another trial of the instant proceedings, we say that we do not agree with respondents' contention that a shareholder of a domestic life insurance company has no right, either at common law or by statute, to a list of shareholders, and that for that reason respondents' motion to strike the second amended petition should have been sustained and the suit dismissed.

The judgment of the superior court of Cook county is reversed and the case is remanded for a new trial.

JUDGMENT ORDER REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

Bulliven and Friend, JJ., concur.

41532

NATIONAL BRANDS STORES, INC.,
a corporation,

Appellant,

v.

H. J. ANDRESEN and GENOVEVA
ANDRESEN,

Appellees.

79
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

314 I.A. 194

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A first class action in the Municipal court of Chicago. The cause was tried by the court without a jury, the issues were found against plaintiff, and it appeals from a judgment entered upon the finding.

We may state at the outset that defendants' complaint that plaintiff filed a very incomplete abstract is a meritorious one.

The original statement of claim, filed on October 17, 1939, alleged that plaintiff on July 7, 1938, delivered certain fixtures and equipment to defendants under a conditional sales contract whereby defendants agreed to pay therefor the sum of \$3,478.18 in thirty-six equal monthly installments, after crediting the down payment, beginning with the month of July, 1938, and continuing monthly thereafter until the total amount was paid. The statement of claim states the fixtures and equipment delivered to defendants under the contract; it also states: "That the buyers, ~~Stocks and buyers~~ defendants herein, failed and neglected to make the payments provided in said conditional sales contract, but have been making payments of a lesser amount than the amount specified in the contract to be paid each month; that the total payment made to date on account of said contract amount to \$928.78; that under the terms of said conditional sales contract the defendants are now in arrears under the terms of said contract in the amount of \$2,549.40, and that the total

41532

NATIONAL BRANDS STORES, INC.,
a corporation,
Plaintiff,

APPEAL FROM JUDICIAL

COURT OF CHICAGO.

N. J. ANDERSEN and GEMOVAYA
ANDERSEN,
Appellants.

31114.194

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

A first class action in the Municipal Court of Chicago. The cause was tried by the court without a jury, the issues were found against plaintiff, and it appeals from a judgment entered upon the finding.

We may state at the outset that defendants' complaint that plaintiff filed a very incomplete statement is a reprehensible one.

The original statement of claim, filed on October 17, 1939, alleged that plaintiff on July 7, 1938, delivered certain fixtures and equipment to defendants under a conditional sales contract whereby defendants agreed to pay therefor the sum of \$3,478.18 in thirty-six equal monthly installments, after crediting the down payment, beginning with the month of July, 1938, and continuing monthly thereafter until the total amount was paid. The statement of claim states the fixtures and equipment delivered to defendants under the contract; it also states "That the buyers, ~~defendants~~ defendants herein, failed and neglected to make the payments provided in said conditional sales contract, but have been making payments of a lesser amount than the amount specified in the contract to be paid each month; that the total payment made to date on account of said contract amount to \$928.78; that under the terms of said conditional sales contract the defendants are now in arrears under the terms of said contract in the amount of \$2,549.40, and that the total

balance due on said contract amounts to \$2,549.40; that under the terms of said contract the entire balance has become and is now, by virtue of the failure of the defendants to make the payments promptly as provided in said contract, due and payable. Wherefore, plaintiff demands judgment against the defendants and each of them for the recovery of the possession of the said furniture and fixtures and that the amount of the payments made by the defendants to the plaintiff to date be forfeited by the defendants to the plaintiff as liquidated damages sustained by the plaintiff because of the failure of the defendants to comply with and fulfill the terms of the said conditional sales contract; plaintiff also demands judgment for its costs in this proceeding and for interest as by law provided." The statement of claim was verified by M. A. Smith, an employee of plaintiff. On November 15, 1939, plaintiff filed an amended statement of claim consisting of two counts. Count one sets forth what purports to be a written executed conditional sales contract dated July ____ 1938, which stipulates a purchase price of \$3,478.18; that \$984.51 had been paid by defendants. Count two alleges that in July, 1938, plaintiff and defendants entered into a written conditional sales contract covering fixtures and equipment installed in defendants' store; that before these fixtures were installed defendants ordered additional fixtures, and that thereupon a second written conditional sales contract was entered into by the parties; that thereafter defendants ordered additional fixtures and that all of the fixtures installed by plaintiff in defendants' store were included in a third and final sales contract entered into between plaintiff and defendants, which stipulated a purchase price of \$3,478.18; that this final contract has been lost by plaintiff; that if the court should find at the hearing that the existence of the final conditional sales contract was not established as a binding contract, that plaintiff is entitled to recover the fair market value of

balance due on said contract amounts to \$2,492.43; that under the terms of said contract the entire balance has become due and is now due by virtue of the failure of the defendants to make the payments promptly as provided in said contract, due and payable, wherefore, plaintiff demands judgment against the defendants and each of them for the recovery of the possession of the said furniture and fixtures and that the amount of the payments made by the defendants to the plaintiff to date be forfeited by the defendants to the plaintiff as liquidated damages sustained by the plaintiff because of the failure of the defendants to comply with and fulfill the terms of the said conditional sales contract; plaintiff also demands judgment for its costs in this proceeding and for interest as by law provided." The statement of claim was verified by L. A. Smith, an employee of plaintiff. On November 15, 1939, plaintiff filed an amended statement of claim consisting of two counts. Count one sets forth what purports to be a written executed conditional sales contract dated July 1, 1938, which stipulated a purchase price of \$3,498.18; that \$294.71 had been paid by defendant. Count two alleges that in July, 1938, plaintiff and defendant entered into a written conditional sales contract covering fixtures and equipment installed in defendants' store; that before these fixtures were installed defendants ordered additional fixtures, and that thereupon a second written conditional sales contract was entered into by the parties; that thereafter defendants ordered additional fixtures and that all of the fixtures installed by plaintiff in defendants' store were included in a third and final sales contract entered into between plaintiff and defendant, which stipulated a purchase price of \$3,498.18; that this final contract has been lost by plaintiff; that if the court should find at the hearing that the existence of the final conditional sales contract was not established as a binding contract, that plaintiff is entitled to recover the fair market value of

the equipment and fixtures installed, amounting to \$4,672.36. Count two states the amount due to be \$4,672.36 less \$984.51 that had been paid by defendants. This amended statement of claim was verified by M. A. Smith. On February 9, 1940, plaintiff filed an amendment to the amended statement of claim. This amendment alleges that if the third and final written conditional sales contract set forth in haec verba in the amended statement of claim was not signed by plaintiff and defendants, it was a mere oversight on the part of plaintiff and defendants; that all of the terms of this contract were agreed upon by the parties as set forth in the amended statement of claim and constitute a written agreement between the parties as in the amended statement of claim set forth. This amendment was verified by R. E. Slaughter, secretary of plaintiff corporation. The trial commenced on May 21, 1940, before the Honorable John J. Rooney. After nearly all of the evidence had been heard plaintiff filed a further amendment to the amended statement of claim as amended. This last amendment states:

"(1) Plaintiff moves to strike from Count I of the amended statement of claim the claim based upon the lost conditional sales contract.

"(2) Plaintiff amends Count II of the amended statement of claim by striking from paragraph (3) and the concluding paragraph thereof the words 'fair market value' and 'full, true, and fair market value' and substituting in lieu of said words the following:

"costs to plaintiff of the property so delivered to the defendants, as aforesaid, plus brokerage; that the costs to plaintiff of said property on the date and dates of the delivery thereof amount to \$3,350.52; that the brokerage thereon amounts to \$201.00, and that the total amount due on account of costs to plaintiff, plus brokerage, amounts to \$3,551.52."

that the intent and purpose of this motion is to amend the second count of the amended complaint in order to base the complaint on the verbal contract between plaintiff and defendant, to-wit that

the equipment and fixtures installed, amounting to \$4,672.36.
Count two states the amount due to be \$4,672.36 less \$984.11
that had been paid by defendants. This amended statement of
claim was verified by H. A. Smith. On February 9, 1940, plain-
tiff filed an amendment to the amended statement of claim. This
amendment alleges that in the third and final written conditional
sales contract set forth in para 3 in the amended statement
of claim was not signed by plaintiff and defendants, it was a mere
oversight on the part of plaintiff and defendants; that all of
the terms of this contract were agreed upon by the parties as set
forth in the amended statement of claim and constitute a written
agreement between the parties as in the amended statement of claim
set forth. This amendment was verified by H. B. Shalshuler,
secretary of plaintiff corporation. The trial commenced on May
21, 1940, before the Honorable John J. Rooney. After nearly all
of the evidence had been heard, plaintiff filed a further amendment
to the amended statement of claim as amended. This last amend-
ment states:

"(1) Plaintiff moves to strike from Count I of the amended
statement of claim the claim based upon the last conditional sales
contract,

"(2) Plaintiff amends Count II of the amended statement of
claim by striking from paragraph (3) and the concluding paragraph
thereof the words 'fair market value' and 'full, true, and fair
market value' and substituting in lieu of said words the following:

"costs to plaintiff of the property so delivered to
the defendants, at \$2,451.52, plus charges; that
the costs to plaintiff of said property on the date
and date of the delivery thereof amount to \$3,370.52;
that the brokerage thereon amounts to \$201.00; and that
the total amount due on account of costs to plaintiff,
plus charges, amounts to \$3,451.52."

that the intent and purpose of this motion is to amend the second
count of the amended complaint in order to have the complaint set
the verbal contract between plaintiff and defendant. to wit:

defendant agreed to pay to plaintiff for the equipment installed the cost thereof to the plaintiff plus a brokerage."

By this last amendment plaintiff abandoned any claim upon the third and final written conditional sales contract set forth in haec verba in count one of its amended statement of claim. It also abandoned any claim for the fair market value of the fixtures alleged in count two of the first amended statement of claim.

Defendants' answer sets forth a single theory of fact, which defendants adhered to throughout the trial. The answer alleges that on September 28, 1938, defendants and plaintiff entered into a conditional sales contract wherein and whereby defendants contracted to purchase and plaintiff contracted to sell the following goods and chattels: (Here follows a list of the goods and chattels); that under the terms and conditions of the contract defendants were to pay for said goods and chattels \$2,269, of which \$263 was paid concurrently with the execution of the contract, and the balance of \$2,006 was to be paid in thirty-six equal successive monthly installments of \$55.73, on October 28, 1938, and the same day of each month thereafter until paid; that at the time of the execution of said contract any and all prior contracts, whether written or oral, were rescinded, cancelled, rendered void, and wholly merged into the said contract of September 28, 1938; that they have paid monthly to plaintiff under the said contract the installments of \$55.73 as provided in the contract, and that these payments were accepted by plaintiff. The answer further alleges that the two prior contracts between the parties that had been entered into before the contract dated September 28, 1938, was executed, were merged in the contract of September 28, 1938.

Plaintiff's final theory is "that it sold the furniture and fixtures in question to the defendants pursuant to a verbal

defendant agreed to pay to plaintiff for the equipment installed
the cost thereof to the plaintiff plus a percentage."

By this last amendment of plaintiff's complaint, any claim
upon the third and final written conditional sales contract set
forth in page seven in count one of its amended complaint of
claim. It also abandoned any claim for the fair market value
of the fixtures alleged in count two of the first amended
statement of claim.

Defendants' answer sets forth a single theory of fact,
which defendants adhere to throughout the trial. The answer
alleges that on September 28, 1938, defendants and plaintiff
entered into a conditional sales contract wherein and whereby
defendants contracted to purchase and plaintiff contracted to
sell the following goods and chattels: (The following is a list
of the goods and chattels) that under the terms and conditions
of the contract defendants were to pay for said goods and chattels
\$2,200, of which \$200 was paid concurrently with the execution
of the contract, and the balance of \$2,000 was to be paid in
thirty-six equal successive monthly installments of \$55.56, on
October 28, 1938, and the same day of each month thereafter until
paid; that at the time of the execution of said contract any and
all prior contracts, whether written or oral, were rescinded, can-
celled, rendered void, and wholly merged into the said contract
of September 28, 1938; that they have paid monthly to plaintiff
under the said contract the installments of \$55.56 as provided
in the contract, and that these payments were accepted by plain-
tiff. The answer further alleges that the two prior contracts
between the parties that had been entered into before the contract
dated September 28, 1938, was executed, were merged in the con-
tract of September 28, 1938.

Plaintiff's final theory is that it said the defendant
and fixtures in question to the defendant pursuant to a verbal

contract between plaintiff and defendants, which provided that plaintiff would sell and install said furniture and fixtures on the basis of the cost of the property to plaintiff, plus brokerage; that pursuant thereto plaintiff delivered and installed the equipment, and that it was contemplated by the parties that when delivery and installation of all the equipment had been completed a conditional sales contract would be entered into on the basis of said verbal contract, of cost plus brokerage; that no such conditional sales contract was ever entered into because defendants refused to sign the final one presented to them for signature, and that the only time there was a meeting of minds of the parties was in the said verbal contract; that none of the several forms of conditional sales contracts which were prepared, some of which were signed by defendants and none of which were ever signed by plaintiff, ever became a contract between the parties; that the defendants tried to take advantage of the plaintiff by refusing to sign a conditional sales contract for all the material after it had been installed and by selecting one of the several forms that had been prepared during the progress of the work and which contained only a part of the equipment, and attempting to adopt it as the final contract; that it would be unfair, unjust, inequitable and illegal for defendants to pay less than the cost to plaintiff of the said equipment, unless such an advantage over the plaintiff were obtained under a specific, mutually binding contract, entered into with plaintiff for a valuable consideration which was not the case. There never was such a contract, nor was there any consideration for such a contract."

Defendants contend: "1. The trial court properly found for the defendants, since the evidence established a valid contract between the plaintiff and the defendants under which the defendants

contract between plaintiff and defendants, which provided that plaintiff would sell and install said furniture and fixtures on the basis of the cost of the property to plaintiff, plus brokerage; that pursuant thereto plaintiff delivered and installed the equipment, and that it was contemplated by the parties that when delivery and installation of all the equipment had been completed a conditional sales contract would be entered into on the basis of said verbal contract, of cost plus property, that no such conditional sales contract was ever entered into because defendants refused to sign the final one presented to them for signature, and that the only time there was a meeting of minds of the parties was in the said verbal contract; that none of the several forms of conditional sales contracts which were prepared, some of which were signed by defendants and none of which were ever signed by plaintiff, ever became a contract between the parties; that the defendants tried to take advantage of the plaintiff by refusing to sign a conditional sales contract for all the material after it had been installed and by retaining one of the several forms that had been prepared during the progress of the work and which contained only a part of the equipment, and attempting to adopt it as the final contract; that it would be unfair, unjust, inequitable and illegal for defendants to pay less than the cost to plaintiff of the said equipment, unless such an advantage over the plaintiff were obtained under a specific, mutually binding contract, entered into with plaintiff for a valuable consideration which was not the case. There never was such a contract, nor was there any consideration for such a contract."

Defendants contend: "1. The trial court properly found for the defendants, since the evidence established a valid contract between the plaintiff and the defendants under which the defendants

paid, and the plaintiff accepted and retained, the stipulated down payment, the defendants executed and delivered, and the plaintiff accepted and retained, a note providing for the payment of the balance of the purchase price in monthly installments, and the defendants are punctually paying, and plaintiff is accepting, the monthly installments in accordance with the note and contract.

2. The evidence not only does not sustain, but in fact negatives, plaintiff's claim that the contract between the parties for the sale of the fixtures and equipment fixes the price at plaintiff's cost plus brokerage."

Plaintiff is engaged, inter alia, in selling store equipment and fixtures. Defendants, husband and wife, owned and operated a grocery store at 1733 West 75th Place, Chicago. Plaintiff contends: (1) "The court erred in failing to find the issues for the plaintiff on the verbal contract entered into between the parties in January, 1938, because at that time and only at that time, was there a meeting of minds of the parties on all the terms of the agreement." (2) "The court erred in finding the issues for the defendants because defendants utterly failed to establish the existence of the sealed, written conditional sales contract, dated September 28, 1938, which they alleged as an affirmative defense." In support of plaintiff's contention that the only contract entered into between the parties was a verbal contract made in January, 1938, plaintiff depends upon the testimony of M. A. Smith, who testified that either late in January or early in February, 1938, he called on defendants with Harold Oakes, an employee of plaintiff, who "had contacted them previously," and during the course of a conversation he had with the defendants regarding the installation of the equipment Mr. Andresen ask him to give a price on certain items of equipment and that he stated to defendants that until it was determined what equipment would actually be required he

paid, and the plaintiff accepted and retained, the original
down payment, the defendants executed and delivered, and the
plaintiff accepted and retained, a note providing for the payment
of the balance of the purchase price in monthly installments, and
the defendants are punctually paying, and plaintiff is accepting,
the monthly installments in accordance with the note and contract.
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plaintiff's claim that the contract between the parties for the
sale of the fixtures and equipment fixes the price at plaintiff's
cost plus brokerage."

Plaintiff is engaged, inter alia, in selling store equip-
ment and fixtures. Defendants, husband and wife, owned and operated
a grocery store at 1733 West 77th Place, Chicago. Plaintiff con-
tends: (1) "The court erred in failing to find the issue for the
plaintiff on the verbal contract entered into between the parties
in January, 1938, because at that time and only at that time, was
there a meeting of minds of the parties on all the terms of the
agreement." (2) "The court erred in finding the issue for the
defendants because defendants utterly failed to establish the
existence of the sealed, written conditional sales contract, dated
September 28, 1938, which they allege as an affirmative defense."
In support of plaintiff's contention that the only contract entered
into between the parties was a verbal contract made in January,
1938, plaintiff depends upon the testimony of U. A. Smith, who
testified that either late in January or early in February, 1938,
he called on defendants with Harold Oakes, an employee of plain-
tiff, who "had contacted them previously," and during the course
of a conversation he had with the defendants regarding the install-
tion of the equipment, Oakes asked him to give a price on cer-
tain items of equipment and that he stated to defendants that until
it was determined what equipment would actually be required he

could not quote them a price, but that plaintiff would supply whatever equipment was required "at our cost plus our nominal National Brands brokerage fee;" that Andresen said that that was fair; that Andresen further said: "Any equipment necessary to go in there we will pay for your cost and your commission, is that right? A. Yes." Mr. Andresen denied that Smith or anyone connected with plaintiff made any proposal to defendants at any time based upon cost plus brokerage; that "I never heard a statement in regard to an agreement by me to pay on the basis of cost to the plaintiff, plus a brokerage commission. The first time I heard it was in this court room when Mr. Smith was on the stand. Prior to that time no demand had been made upon me by anyone representing the plaintiff, either by letter or by word of mouth, wherein it was stated that I owed for brokerage commission, installation and freight." During the examination of Mrs. Andresen she testified that she was present on various occasions when representatives of plaintiff came to their store or home in connection with the purchase of fixtures. The following then occurred: "Q. Now tell this Court whether or not at any conversation at which you were present, there was ever discussed a price to be charged to you and Mr. Andresen for all the fixtures, that would be based on what the National Brands might pay for the fixtures, plus a brokerage commission? A. Absolutely not. Mr. Quilici [attorney for defendants]: Take the witness. Mr. McKerchar [attorney for plaintiff]: No cross examination." It appears from the testimony of Smith that Harold Oakes, an employee of plaintiff, who "had contacted" the defendants, was present at the alleged conversation. It further appears that Oakes was present in court during the trial, but plaintiff did not call him as a witness. The failure to call Oakes creates an inference that Oakes' testimony if he had been called would not have corroborated Smith's version of the conversation. (See Pipal v. Grand Trunk Western Ry. Co., 341 Ill. 320,

could not get them a price, but that plaintiff would supply whatever equipment was required "at our cost plus our usual National Brands brokerage fee;" that Anderson said that that was fair; that Anderson further said: "Any equipment necessary to go in there we will pay for your cost and your commission, is that right? Yes." Mr. Anderson denied that he or anyone connected with plaintiff made any proposal to do anything at any time based upon cost plus brokerage; that "I never made a statement in regard to an agreement by me to pay on the basis of cost plus the plaintiff's plus a brokerage commission, the first time I heard it was in this court room when Mr. Smith was on the stand. Prior to that time no demand had been made upon me by anyone, it was nothing the plaintiff, either by letter or by word of mouth, whereas it was stated that I owed for brokerage commission, installation and freight." During the examination of Mrs. Anderson she testified that she was present on various occasions when these matters of plaintiff came to their store or home in connection with the purchase of fixtures. The following then occurred: "Q. Now tell this Court whether or not at any conversation at which you were present, there was ever discussed a price to be charged to you and Mr. Anderson for all the fixtures, that would be based on what the National Brands might pay for the fixtures, plus a brokerage commission? A. Definitely not, Mr. Smith [at once] for defendants: I like the witness, Mr. Anderson [turning to plaintiff]: No cross examination." It appears from the testimony of Smith that Harold Oakes, an employee of plaintiff, who "had contacted" the defendants, was present at the alleged conversation. It further appears that Oakes was present in court during the trial, but plaintiff did not call him as a witness. The failure to call Oakes creates an inference that Oakes' testimony if he had been called would not have corroborated Smith's version of the conversation. (See Legal v. Great Truck Western Ry. Co., 201 Ill. 420.)

327, and cases cited therein.) Defendants, for the purpose of emphasizing plaintiff's failure to call Oakes, introduced evidence to show that he had been present during the trial. In testing the credibility of Smith's statement as to the alleged conversation it is important to note that he verified the original statement of claim and the amended statement of claim. Plaintiff's final claim based upon the alleged conversation was clearly an afterthought, and the able and experienced trial judge was fully warranted in refusing to believe Smith's testimony as to the alleged conversation, especially in view of the shifty attitude of plaintiff in reference to its claim.

As to plaintiff's contention (2): We have before us what purports to be the written contract of September 28, 1938. Defendants contend that it was an executed written contract that merged all prior contracts and discussions. Plaintiff concedes that this contract, dated eight months after the alleged conversation, was drafted by M. A. Smith; that the contract was executed by defendants in duplicate; that Smith retained the original and left the carbon copy with defendants; that concurrently with the signing of the contract by defendants the down payment therein specified, \$263, was accepted by Smith, who turned it over to plaintiff; that a written receipt for the down payment in accordance with the contract was executed by Smith and delivered to defendants; and that monthly payments in the sums and at the times required by the contract have been duly and punctually paid by defendants and accepted and retained by plaintiff. At the time that defendants signed this contract Smith wrote out and handed to defendants the following receipt:

"9/28/38

"Recieved of H. J. Andresen ----- 263.00
as follows:

"\$200.00 P.O. money order
3.58 Reciepted bills
59.42 Cash

327, and cases cited therein.) Defendants, for the purpose of emphasizing plaintiff's failure to call cases, introduced evidence to show that he had been present during the trial. In testing the credibility of Smith's statement as to the alleged conversation it is important to note that he verified the original statement of claim and the amended statement of claim. Plaintiff's final claim based upon the alleged conversation was clearly an afterthought, and the able and experienced trial judge was fully warranted in refusing to believe Smith's testimony as to the alleged conversation, especially in view of his shifty attitude of plaintiff in reference to its claim.

As to plaintiff's contention (2): We have before us what purports to be the written contract of September 28, 1926, defendants contend that it was an executed written contract that merged all prior contracts and discussions. Plaintiff contends that this contract, dated eight months after the alleged conversation, was drafted by J. A. Smith; that the contract was executed by defendants in duplicate; that Smith retained the original and left the carbon copy with defendants; that concurrently with the signing of the contract by defendants the down payment therein specified, \$263, was accepted by Smith, who turned it over to plaintiff; that a written receipt for the down payment in accordance with the contract was executed by Smith and delivered to defendants; and that monthly payments in the sum of \$100 at the times required by the contract have been duly and punctually paid by defendants and accepted and retained by plaintiff. At the time this defendant signed this contract Smith wrote out and handed to defendants the

following receipt:

"Received of H. J. Anderson \$263.00 as follows:
\$200.00 1.00 money order
3.78 accepted bills
59.22 cash

as down payment on equipment contract,

"National Brands Stores, Inc.
"M. A. Smith"

Plaintiff's contention, as we understand it, is that plaintiff never formally signed this contract. That Smith signed his name to the contract at the time in question is conceded, but plaintiff claims that his signature appears opposite the word "Witness," and it insists that he signed only as a witness. Plaintiff does not contend that Smith had not the authority to sign the contract. There was no necessity for Smith to sign the contract as a witness, for W. A. Holst, who had no connection with the parties, signed the contract as a witness. It appears from the evidence that Smith's purpose in procuring the new contract from defendants in lieu of the prior contract was that the finance company would not accept the other contract and that it was therefore necessary to make out a new form of contract. At the same time that the contract of September 28 was signed by defendants, Smith and Andresen signed their names to the list of the equipment, and this list was annexed to and made a part of the contract. It is clear that Smith did not sign this list as a witness. Plaintiff retained the original of this contract and accepted the down payment and the note, signed by defendants at Smith's request, for the balance due under the contract. Plaintiff thereafter accepted payments made by defendants in accordance with the contract for more than a year before it commenced the instant suit, and it was still accepting payments at the time of the trial. Plaintiff never tendered back to defendants their note, nor did it tender back the payments made by defendants under the contract. All the facts and circumstances show that this contract was a written one between plaintiff and defendants even though it was not formally signed by plaintiff. One who acts upon and accepts the benefit of what purports to be a written contract will be bound by that

as down payment on equipment contract,
"National Brands Stores, Inc."
"E. A. Smith"

Plaintiff's contention, as we understand it, is that Plaintiff never formally signed this contract. That Smith signed his name to the contract at the time in question is conceded, but Plaintiff claims that his signature appears opposite the word "Witness," and it insists that he signed only as a witness. Plaintiff does not contend that Smith had not the authority to sign the contract. There was no necessity for Smith to sign the contract as a witness, for E. A. Smith, who had no connection with the parties, signed the contract as a witness. It appears from the evidence that Smith's purpose in procuring the new contract from defendants in lieu of the prior contract was that the finance company would not accept the other contract and that it was therefore necessary to make out a new form of contract. At the same time that the contract of September 28 was signed by defendants, Smith and Andersen signed their names to the list of the equipment, and this list was annexed to and made a part of the contract. It is clear that Smith did not sign this list as a witness. Plaintiff retained the original of this contract and accepted the down payment and the note, signed by defendants at Smith's request, for the balance due under the contract. Plaintiff thereafter accepted payments made by defendants in accordance with the contract for more than a year before it commenced the instant suit, and it was still accepting payments at the time of the trial. Plaintiff never tendered back to defendants their note, nor did it tender back the payments made by defendants under the contract. All the facts and circumstances show that this contract was a written one between Plaintiff and defendants even though it was not formally signed by Plaintiff. One who sets upon and accepts the benefit of what purports to be a written contract will be bound by that

contract even though he has not signed it. See Broderick v. Driscoll, 301 Ill. 174, 178; Bauer v. Jerolman, 124 Ill. App. 151, 155. Many other cases to the same effect might be cited if it were necessary.

Plaintiff argues that the printed word "Seal" appears after defendants' signatures to the contract and therefore the contract was not valid without proof that Smith had authority by an instrument under seal to enter into such a contract on plaintiff's behalf. This argument, under the facts and circumstances, does not merit serious consideration.

In this court plaintiff contends that "if the trial judge believed from the evidence that both parties had failed to establish by the required degree or certainty of proof, the contract which they were trying to establish, respectively, and if therefore in his opinion neither party had established the existence of an express contract, then the judge should have found the existence of an implied contract that defendants should pay to plaintiff whatever the court believed from the evidence the goods to be reasonably worth, and should have entered a judgment for plaintiff for that amount." It is sufficient to say in answer to this contention that the trial court was fully justified in finding that there was an express contract between the parties, viz., the written agreement of September 28, 1938. However, plaintiff will not be heard to urge this contention in this court, for it appears that after the trial had commenced plaintiff was allowed to strike from its statement of claim all allegations relating to, and prayers for the recovery of, reasonable value, and to substitute in lieu thereof a claim on an express verbal contract for cost plus brokerage. In such a state of the record plaintiff cannot now make a claim in this court for the reasonable value of the goods.

We have considered several supertechnical points raised

contract even though he has not signed it. See Proderick v. Prisco, 301 Ill. 174, 178; Barber v. Johnson, 124 Ill. App. 151, 152. Many other cases to the same effect might be cited if it were necessary.

Plaintiff argues that the printed word "Seal" appears after defendant's signature to the contract and therefore the contract was not valid without proof that Seal had authority by an instrument under seal to enter into such a contract on plaintiff's behalf. This argument, under the facts and circumstances, does not merit serious consideration.

In this court plaintiff contends that "if the trial judge believed from the evidence that both parties had failed to establish by the required degree or certainty of proof, the contract which they were trying to establish, respectively, and if therefore in his opinion neither party had established the existence of an express contract, then the judge should have found the existence of an implied contract that defendant should pay to plaintiff whatever the court believed from the evidence the goods to be reasonably worth, and should have entered a judgment for plaintiff for that amount." It is sufficient to say in answer to this contention that the trial court was fully justified in finding that there was an express contract between the parties, viz., the written agreement of September 28, 1938. However, plaintiff will not be heard to wipe this contention in this court, for it appears that after the trial had commenced plaintiff was allowed to strike from its statement of claim all allegations relating to, and prayers for the recovery of, reasonable value, and to substitute in lieu thereof a claim on an express verbal contract for cost plus brokerage. In such a state of the record plaintiff cannot now make a claim in this court for the reasonable value of the goods.

It has been considered several supertechanical points raised

by plaintiff and find them without any real merit.

Plaintiff strenuously contends that if the judgment in this case is affirmed plaintiff will lose considerable money. A reading of the entire record convinces us that the instant claim was born of a desire to make defendants stand a loss that plaintiff claims it sustained in the transaction. Defendants, grocery storekeepers, in good faith entered into a written contract prepared by plaintiff. It is conceded that defendants have punctually met their obligations under the note and the contract. Plaintiff accepted and retained the written contract, the note, the down payment, and the monthly installments. The lack of merit in plaintiff's suit is accentuated by the frequent changes in its theory of fact.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

by plaintiff and find ones without any real merit.
Plaintiff strenuously contends that if the defendant in
this case is affirmed plaintiff will lose considerable money.
A reading of the entire record convinces us that the instant
claim was born of a desire to make defendant stand a loss that
plaintiff claims it sustained in the transaction. Defendants,
grocery storekeepers, in good faith entered into a written
contract prepared by plaintiff. It is conceded that defendants
have punctually met their obligations under the note and the
contract. Plaintiff accepted and retained the written contract,
the note, the down payment, and the monthly installments. The
lack of merit in plaintiff's suit is accentuated by the frequent
changes in its theory of fact.
The judgment of the Municipal Court of Chicago is
affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

41542

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. CHARLES E. ELMORE,
Appellee,

v.

JAMES P. ALLMAN, Commissioner
of Police of the City of Chicago,
JOSEPH P. GEARY, WENDELL E.
GREEN and JOHN E. BRENNAN, Civil
Service Commissioners of the City
of Chicago, and ROBERT B. UPHAM,
Comptroller of the City of
Chicago,

Appellants.

80
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APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

3141.A.194²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The relator, Charles E. Elmore, filed his petition for mandamus seeking his restoration as patrolman in the classified service of the department of police of the City of Chicago. Defendants filed their motion to strike the petition and to dismiss the suit. The trial court denied defendants' motion and ordered them to file their answer. After the answer was filed the relator moved to strike it as insufficient in law. The trial court sustained relator's motion and the defendants, electing to abide by their answer, the court entered judgment awarding the writ of mandamus, which commanded defendants to restore the relator to duty and to do all acts necessary and requisite to place relator on the roster and payroll of said City. The court reserved jurisdiction for the purpose of passing upon the relator's right to back salary. Defendants have appealed.

Defendants strenuously contend that the trial court erred in not holding that mandamus was not the proper remedy to review the action of the Civil Service Commission and in not sustaining defendants' motion to strike the petition for mandamus, and in not dismissing said petition. These contentions raise the question: Does mandamus lie to review the proceedings of the

PEOPLE OF THE STATE OF ILLINOIS,
 ex rel. CHARLES E. WIMORE,
 Appellee,

v.

JAMES P. ALLMAN, Commissioner
 of Police of the City of Chicago,
 JOSEPH F. GARRY, WILLIAM H.
 GRON and JOHN E. BROWN, Civil
 Service Commissioners of the City
 of Chicago, and ROBERT B. UPHAM,
 Comptroller of the City of
 Chicago,
 Appellants.

APPEAL FROM CIRCUIT
 COURT OF COOK COUNTY.

3141.A.194

MR. PRESIDING JUSTICE SOMERAN DELIVERED THE OPINION OF THE COURT.

The relator, Charles E. Wimore, filed his petition for mandamus seeking his restoration as patrolman in the classified service of the department of police of the City of Chicago. Defendants filed their motion to strike the petition and to dismiss the suit. The trial court denied defendants' motion and ordered them to file their answer. After the answer was filed the relator moved to strike it as insufficient in law. The trial court sustained relator's motion and the defendants electing to abide by their answer, the court entered judgment awarding the writ of mandamus, which commanded defendants to restore the relator to duty and to do all acts necessary and requisite to place relator on the roster and payroll of said City. The court reserved jurisdiction for the purpose of hearing upon the relator's right to back salary. Defendants have appealed. Defendants strenuously contend that the trial court erred in not holding that mandamus was not the proper remedy to review the action of the Civil Service Commission and in not sustaining defendants' motion to strike the petition for mandamus, and in not dismissing said petition. These contentions raise the question: Does mandamus lie to review the proceedings of the

Civil Service Commission or must this be done by certiorari alone? That question was squarely raised in People ex rel. Aeberly v. City of Chicago et al., 240 Ill. App. 208. There the First Division of this court, speaking through Mr. Justice McSurely, said (pp. 212, 213):

"Does mandamus lie to review the proceedings of the civil service commission, or must this be done by certiorari only? While, apparently, the writ of mandamus and certiorari have both been used for the same purpose, namely, to reinstate a party to an office from which he has been illegally removed or suspended, yet considering the history and purpose of the two actions with the reported decisions, we conclude that the writ of mandamus will not lie to review the proceedings of the civil service commission.

"The purpose of the writ of mandamus, when directed to subordinate tribunals exercising judicial or discretionary power, is to compel them to act, but never to compel them to decide in a particular manner. The writ is a command in the name of the State directed to some corporation, officer or inferior court, requiring the performance of a particular duty resulting from the official station of the party to whom the writ is directed. Mandamus lies to compel, not to revise or correct, action however erroneous it may have been. On the other hand, the office of the writ of certiorari is to review the proceedings in an inferior court to ascertain their validity. It is to bring up proceedings from the court below for examination so that they may be affirmed or quashed and not to enforce any rights growing out of those proceedings. Summarily stated, mandamus commands action and certiorari reviews an action. 13 Encyclopedia of Pleading and Practice, 'Mandamus'; High's Extraordinary Legal Remedies, 3rd ed., p. 4; 18 R. C. L., 'Mandamus,' p. 87; 5 R. C. L., 'Certiorari,' p. 250; 4 Encyclopedia of Pleading and Practice, 'Certiorari,' p. 10. By statute, the Supreme Court reviews the entire record in

Civil Service Commission or must this be done by certiorari alone? That question was squarely raised in People ex rel. Asberry v. City of Chicago, 240 Ill. 2d 238, 239, where the First Division of this court, speaking through Mr. Justice McCreery, said (pp. 232, 213):

"Does mandamus lie to review the proceedings of the civil service commission, or must this be done by certiorari only? While, apparently, the writ of mandamus and certiorari have both been used for the same purpose, namely, to reinstate a party to an office from which he has been illegally removed or suspended, yet considering the history and purpose of the two writs with the reported decisions, we conclude that the writ of mandamus will not lie to review the proceedings of the civil service commission.

"The purpose of the writ of mandamus, when directed to subordinate tribunals exercising judicial or discretionary power, is to compel them to act, but never to compel them to decide in a particular manner. The writ is a command in the name of the State directed to some corporation, officer or inferior court, requiring the performance of a particular duty resulting from the official station of the party to whom the writ is directed. Mandamus lies to compel, not to revise or correct, action however erroneous it may have been. On the other hand, the office of the writ of certiorari is to review the proceedings in an inferior court to ascertain their validity. It is to bring up proceedings from the court below for examination so that they may be affirmed or quashed and not to enforce any rights growing out of those proceedings. Summarily stated, mandamus commands action and certiorari reviews an action. 13 Encyclopedia of Pleading and Practice, 'Mandamus'; High's Extraordinary Legal Remedies, 3rd ed., p. 4; 18 R. C. L., 'Mandamus', p. 87; 5 R. C. L., 'Certiorari', p. 250; 4 Encyclopedia of Pleading and Practice, 'Certiorari', p. 10. By statute, the Supreme Court reviews the entire record in

cases brought by certiorari. Chapter 110, sec. 120, Illinois Statutes [Cahill's St. ch. 110, par. 119].

"Illinois decisions are not in conflict with this rule, although the precise question does not seem to have been raised, People ex rel. Qualey v. City of Chicago, 203 Ill. App. 192; People ex rel. Jones v. Webb, 256 Ill. 364; McArdle v. City of Chicago, 172 Ill. App. 142.

"In the cited cases of mandamus there was an allegation that the petitioner had been removed entirely contrary to law or without any hearing before the civil service commission or by a board not composed of civil service commissioners. It is conceded that the writ of mandamus will lie to restore a person who has been wrongfully ousted from office under no authority or color of authority and when he has a clear legal right to be reinstated."

There can be no contention in the instant case that the relator was wrongfully ousted from office under no authority or color of authority. Although there are several Appellate court cases that seem to run counter to the ruling in the Aeberly case, supra, we agree with the reasoning and conclusions of Mr. Justice McSurely in the latter case. The Supreme court cases cited by the relator, People v. Kipley, 171 Ill. 44; People v. Kraus, 171 Ill. 130, and People v. Kent, 300 Ill. 324, have no application to the instant question. However, in the view that we take of this appeal it is not necessary for us to decide the instant contentions, for the reason that the sole ground urged by the relator in support of the judgment order of the Circuit court, that "the charges filed before the Civil Service Commission against the plaintiff do not furnish sufficient grounds for his removal and do not constitute legal cause for removal within the meaning of Section 12 of the Civil Service Act," is without merit.

Defendants' answer contains a complete statement of the

cases brought by certiorari. Chapter 110, sec. 120, Illinois
Statutes [Smith's 4th ed. 110, par. 119].
"Illinois decisions are not in conflict with this rule,
although the precise question does not seem to have been raised."
People ex rel. Taylor v. City of Chicago, 203 Ill. 111, 192;
People ex rel. Jones v. City of Chicago, 270 Ill. 364;
Chicago, 175 Ill. 142.

"In the cited cases of mandamus there was an allegation
that the petitioner had been removed entirely contrary to law
or without any hearing before the civil service commission or
by a board not composed of civil service commissioners. It is
conceded that the writ of mandamus will lie to restore a person
who has been wrongfully ousted from office under no authority
or color of authority and when he has a clear legal right to
be reinstated."

There can be no contention in the instant case that the
relator was wrongfully ousted from office under no authority or
color of authority. Although there are several appellate court
cases that seem to run counter to the ruling in the People case,
supra, we agree with the reasoning and conclusions of Mr. Justice
McGowan in the latter case. The Supreme court cases cited by
the relator, People v. Kipley, 171 Ill. 44; People v. Kears, 171
Ill. 130, and People v. Kunt, 300 Ill. 324, have no application to the
instant question. However, in the view that we take of this appeal
it is not necessary for us to decide the instant contentions, for
the reason that the sole ground urged by the relator in support
of the judgment of the Circuit court, that "the charges
filed before the Civil Service Commission against the plaintiff
do not furnish sufficient grounds for his removal and do not con-
stitute legal cause for removal within the meaning of Section 12
of the Civil Service Act," is without merit.
Defendants' answer contains a complete statement of the

record pertaining to the trial and discharge of the relator, and the relator's motion to strike the answer admits that the record as set up in the answer is correct. The record shows that on August 4, 1938, the relator received notice from the Civil Service Commission of the City of Chicago advising him that charges, a copy of which was served upon him, had been filed before the Civil Service Commission by the commissioner of police under Section 12 of the Civil Service Act relating to removals, and that the Commission had ordered that a hearing be had upon the charges in Room 612, City Hall, on August 10, 1938, at 10 o'clock a. m. The relator received the notice and a copy of the charges, and he attended the hearing before the Commission and was represented there by counsel. To quote from the record:

"DEPARTMENT OF POLICE

"Chicago, July 29th, 1938.

"To the Civil Service Commission
of the City of Chicago:

"I hereby make the following charges against Charles E. Elmore, Rank Patrolman, Department of Police of the Thirty Fifth (35th) District, in the classified service of the City of Chicago, and request that the same be investigated by the Civil Service Commission or by an officer or board appointed by said Commission, and that proper action be taken thereon, under Section 12 of the Civil Service Act and the rules of the Commission.

"CHARGES

"Violation of the following Sections of Rule 289, Rules and Regulations of the Department of Police, City of Chicago, promulgated and in force and effect January 22nd, 1934, viz:

record pertaining to the trial and discharge of the relator, and the relator's motion to strike the answer admits that the record as set up in the answer is correct. The record shows that on August 4, 1938, the relator received notice from the Civil Service Commission of the City of Chicago advising him that charges, a copy of which was served upon him, had been filed before the Civil Service Commission by the commissioner of police under Section 12 of the Civil Service Act relating to removals, and that the Commission had ordered that a hearing be had upon the charges in Room 612, City Hall, on August 10, 1938, at 10 o'clock a. m. The relator received the notice and a copy of the charges, and he attended the hearing before the Commission and was represented there by counsel. To quote from the record:

"DEPARTMENT OF POLICE

"Chicago, July 29th, 1938.

"To the Civil Service Commission
of the City of Chicago:

"I heretby make the following charges against Charles E. Limore, Rank Patrolman, Department of Police of the Thirty-Fifth (35th) District, in the classified service of the City of Chicago, and request that the same be investigated by the Civil Service Commission or by an officer or board appointed by said Commission, and that proper action be taken thereon, under Section 12 of the Civil Service Act and the rules of the Commission.

"CHARGES

"Violation of the following Sections of Rule 229, Rules and Regulations of the Department of Police, City of Chicago, promulgated and in force and effect January 22nd, 1934, viz:

"Section 3: Conduct unbecoming a police officer or employee of the Police Department.

"Section 33: Neglect to pay, within a reasonable time, a just indebtedness incurred while in the service.

"SPECIFICATIONS

"It is charged that Charles E. Elmore, Patrolman, assigned to the 35th District, in the Department of Police, City of Chicago, did incur indebtedness to

Frank J. Garvey	3451 W. 21st Street	\$225.00
Thomas J. Jordan	139 N. Clark Street	75.00
A. G. Meier & Co.	205 W. Monroe Street	20.00
Helen Busse	336 S. Illinois Street	
	Villa Park, Ill.	50.00
S. I. Frank & Sons	2412 W. North Avenue	30.00
Harry Garvey	3544 S. California Ave.	35.00
Mrs. Jennie Coleman	210 N. Keystone Ave.	?
Tower Finance Corp.	40 N. Dearborn St.	100.00

which he has failed to pay; that the said Patrolman Charles E. Elmore has no just or valid reason or excuse for his failure to pay said indebtedness, and has no meritorious defense against the claims made against him for the said indebtedness by

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

that the said Patrolman Charles E. Elmore has persistently refused to pay his said indebtedness to the said

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

and has by reason of his said refusal tended to impair his own efficiency in the discharge of his police duties, and has reflected discredit upon the honesty and integrity of all

"Section 3: Conduct was within a police officer or

employee of the Police Department.

"Section 33: Refused to pay, within a reasonable time,

a just indebtedness incurred while in the service.

"EMPLOYEES"

"It is charged that Charles E. Moore, Patrolman,

assigned to the 35th District, in the Department of Police,

City of Chicago, did incur indebtedness to

Frank J. Garvey	3451 W. 51st Street	25.00
Thomas J. Jordan	139 W. Clark Street	75.00
A. G. Meier & Co.	208 W. Monroe Street	50.00
Helan Buss	336 E. Illinois Street	
S. I. Frank & Sons	2412 W. North Avenue	40.00
Harry Garvey	344 S. California Ave.	50.00
Mrs. Jennie Coleman	210 N. Kingston Ave.	35.00
Tower Finance Corp.	40 W. Dearborn St.	100.00
	?	

which he has failed to pay; that the said Patrolman Charles E.

Moore has no just or valid reason or excuse for his failure to

pay said indebtedness, and has no authorized defense against

the claims made against him for the said indebtedness by

Frank J. Garvey
 Thomas J. Jordan
 A. G. Meier & Co.
 Helan Buss
 S. I. Frank & Sons
 Harry Garvey
 Mrs. Jennie Coleman
 Tower Finance Corp.

that the said Patrolman Charles E. Moore has persistently

refused to pay his said indebtedness to the said

Frank J. Garvey
 Thomas J. Jordan
 A. G. Meier & Co.
 Helan Buss
 S. I. Frank & Sons
 Harry Garvey
 Mrs. Jennie Coleman
 Tower Finance Corp.

and has by reason of his said refusal tended to impair his own

efficiency in the discharge of his police duties, and has

reflected discredit upon the honesty and integrity of all

members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families.

"WITNESSES

"NAME	"ADDRESS
Captain Thomas Harrison	35th District
Dept. Inspector Edwin J. Daly	1121 S. State Street
Frank J. Garvey	3451 W. 21st Street
Thomas J. Jordan	139 N. Clark Street
A. G. Meier & Co.	205 W. Monroe Street
Helen Busse	336 S. Illinois Street
	Villa Park, Ill.
S. I. Frank & Sons	2412 W. North Avenue
Harry Garvey	3544 S. California Avenue
Mrs. Jennie Coleman	210 N. Keystone Avenue
Tower Finance Corp.	40 N. Dearborn Street

"Respectfully submitted,

"(Signature)

"Thomas Harrison,

"Captain Commanding - 35th District.

"James P. Allman,

"Commissioner of Police.

"PTLM. Charles E. Elmore, 35th District

"The above officer has always had numerous complaints regarding non-payment of bills on file against him in this office. Due to the number of claims on file against him and his failure to make payment on same as agreed his suspension was recommended in January 1937. Ptlm. Elmore thereupon filed a petition in bankruptcy, No. 65040 thru his attorney Jacob Cohn, 228 N. LaSalle Street and scheduled approximately \$1500.00 in debts, the major part of which was made up of rent and cash loans.

"In June 1937, the Belmont-Central Currency Exchange, 3136 N. Central Ave., tel. Berk. 8140 filed complaint against Ptlm. Elmore regarding three checks which he had passed in three different currency exchanges of their company which were returned marked 'no account.' The checks were made out as follows:

"Check drawn on Main State Bank dated May 20th, 1937

members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families.

"WITNESSES"

"DOORS"

"NAME"

35th District	Captain Thomas Harrison
1121 S. State Street	Dept. Inspector Edwin J. Daly
3471 W. East Street	Frank J. Garvey
139 N. Clark Street	Thomas J. Jordan
202 W. Monroe Street	A. G. Meier & Co.
336 S. Illinois Street	Heleen Busse
Villa Park, Ill.	
2412 W. North Avenue	S. I. Frank & Sons
3744 S. California Avenue	Harry Garvey
210 S. Keystone Avenue	Mrs. Jennie Coleman
40 W. Dearborn Street	Tower Finance Corp.

"Respectfully submitted,

"(Signature)"

"Thomas Harrison,

"Captain Commanding - 35th District.

"James P. Aliman,

"Commissioner of Police,

"P.O. Box 11, Chicago, 35th District

"The above officer has always had numerous complaints regarding non-payment of bills on file against him in this office. Due to the number of claims on file against him and his failure to make payment on same as agreed his suspension was recommended in January 1937. P.O. Box 11, Chicago thereupon filed a petition in bankruptcy, No. 65040 thru his attorney Jacob Gohn, 228 N. LaSalle Street and scheduled approximately \$1500.00 in debts. The major part of which was made up of rent and cash loans. "In June 1937, the Belmont-Central Currency Exchange, 3136 N. Central Ave., Tel. Bern. 8140 filed complaint against P.O. Box 11, Chicago regarding three checks which he had passed in three different currency exchanges of their company which were returned marked 'no account'. The checks were made out as follows:

in favor of Charles Elmore for \$18.40. signed Francis M. Crane. Check returned 'no account'.

"Check drawn on Lake View Trust & Savings Bank, June 1st, 1937, in favor of Charles Elmore for \$16.55, signed Marvin R. Chase, also returned 'no account'.

"A third check for \$21.80 which Elmore cashed and which had been returned 'no account' was redeemed by Elmore before complaint was made.

"On March 9th, 1938, Freeman Bros., 2701 Lincoln Avenue, complained Elmore came into store and bought a bill of goods and cashed a check for \$11.60 on the Main State Bank which was returned 'no account', this check was cashed by Elmore on February 26th, 1938. Elmore promised to redeem same but failed to do so until complaint was made to this office. Mr. Freeman stated he received a cashier's check for \$11.60 from Elmore on March 17th or 18th, 1938, and returned check complained of to Elmore.

"Since Elmore filed his petition in bankruptcy in January 1937, claims totalling over \$600.00 have been filed in this office. He agreed to pay \$25.00 each payday on these claims but has failed to comply. On December 8th, 1937, he was suspended from duty for this failure and restored to duty on December 15th, 1937, upon his promise to pay \$25.00 each payday without fail and that no new debts would be incurred by him. A summary of Elmore's claims are as follows:

"Frank J. Garvey, 3451 W. 21st St., states that on July 15th, 1937, Elmore borrowed \$270.00 from him and gave a note due in six months on same. As no payment was made Garvey filed claim in this office on January 13th, 1938. Since that date Elmore has paid \$45.00 on same, leaving balance due of \$225.00.

"On Feb. 1st, 1938, Thomas J. Jordan, Atty., 139 N.

in favor of Charles Elmore for \$18.40, signed Francis J. Brown.
Check returned 'no account'.

"Check drawn on Lake View Trust & Savings Bank, June 1st,
1937, in favor of Charles Elmore for \$16.57, signed Francis J.
Brown, also returned 'no account'.

"A third check for \$11.80 which Elmore cashed and which
had been returned 'no account' was redeemed by Elmore before
complaint was made.

"On March 9th, 1938, Freeman Bros., 2711 Lincoln Avenue,
complained Elmore came into store and bought a bill of goods
and cashed a check for \$11.60 on the same date which was
returned 'no account', this check was cashed by Elmore on
February 26th, 1938. Elmore promised to redeem same but failed
to do so until complaint was made to this office. Mr. Freeman
stated he received a cashier's check for \$11.60 from Elmore on
March 17th or 18th, 1938, and returned check complained of to
Elmore.

"Since Elmore filed his petition in bankruptcy in January
1937, claims totaling over \$600.00 have been filed in this
office. He agreed to pay \$25.00 each payday on these claims
but has failed to comply. On December 8th, 1937, he was suspended
from duty for this failure and restored to duty on December 15th,
1937, upon his promise to pay \$25.00 each payday without fail and
that no new debts would be incurred by him. A summary of Elmore's
claims are as follows:

"Frank J. Gurvey, 3421 E. 1st St., states that on July
15th, 1937, Elmore borrowed \$270.00 from him and gave a note due
in six months on same. As no payment was made Gurvey filed claim
in this office on January 13th, 1938. Since that date Elmore
has paid \$25.00 on same, leaving balance due of \$225.00.
"On Feb. 1st, 1938, Thomas J. Jordan, Atty., 139 N.

Clark St. filed claim of \$75.00 against Elmore for services rendered in November 1935. Elmore stated Atty. Jordan was willing to wait for payment until some of his other claims were liquidated. No payment has been made on this claim.

"Jacob Cohn, Atty., 228 N. La Salle St., who filed petition in bankruptcy against Elmore filed claim in this office September 3rd, 1937, for services rendered Elmore for \$129.54 and costs as claim had to be reduced to a judgment due to Elmore's failure to make payment. This claim was finally paid in full on April 18th, 1938.

"On October 1st, 1937, Thomas Loome, 5616 S. Spaulding Ave., filed claim for \$85.00 against Elmore stating Elmore had obtained cash loan in that amount in August 1937 on the plea he would have to go to jail for a note he signed to Smith Bros. for paving of alley in rear of Elmore's mother's home. Elmore finally paid this claim in full on April 29th, 1938.

"On January 30th, 1938, Mrs. Moreth, 3055 N. Mason Ave., filed claim for \$40.00 against Elmore for cash loan made October 10th, 1937. This claim was finally liquidated on July 9th, 1938.

"On March 26th, 1937, A. G. Meier & Co., 205 W. Monroe St. filed claim for \$58.86 against Elmore for purchase made December 10th, 1936, upon which only \$5.00 had been paid since purchase. Balance due on this claim at present is \$20.00.

"In August 1937, Helen M. Busse, 336 S. Illinois St., filed claim for \$50.00 rent against Elmore, for month of August. Elmore finally moved from flat owing \$50.00 rent. No payment has been made on this claim as Elmore states claimant was willing to wait until some of his other debts were cleared up.

"On March 23rd, 1938, S. I. Frank & Sons, (furniture) filed claim of \$40.00 against Ptlm. Elmore. A total of \$10.00 has since been paid on claim leaving balance due of \$30.00.

has since been paid on claim leaving balance due of \$30.00
filed claim of \$40.00 against P.M. Limore. A total of \$10.00
"On March 23rd, 1938, J. I. Frank & Sons, (furniture)
to wait until some of his other debts were cleared up.
has been made on this claim as Limore states claimant was willing
Limore finally moved from flat owing \$75.00 rent. No payment
filed claim for \$50.00 rent against Limore, for month of August.
"In August 1937, Helen M. Buss, 336 E. Illinois St.,
Balance due on this claim at present is \$20.00.
10th, 1936, upon which only \$5.00 had been paid since purchase.
filed claim for \$28.86 against Limore for purchase made December
"On March 26th, 1937, A. G. Weber & Co., 205 E. Monroe St.,
10th, 1937. This claim was finally liquidated on July 8th, 1938.
filed claim for \$40.00 against Limore for cash loan made October
"On January 30th, 1938, Mrs. Marybeth, 307 E. Mason Ave.,
finally paid this claim in full on April 29th, 1938.
for paying of alley in rear of Limore's mother's home. Limore
he would have to go to jail for a net he signed to Smith Bros.
obtained cash loan in that amount in August 1937 on the plea
Ave., filed claim for \$27.00 against Limore stating Limore had
"On October 1st, 1937, Thomas Leome, 5010 E. 2nd
finally paid in full on April 18th, 1938.
due to Limore's failure to make payment. This claim was
\$129.74 and costs as claim had to be reduced to a judgment
office September 27th, 1937, for services rendered Limore for
petition in bankruptcy against Limore filed claim in this
"Jacob Conn, Atty., 228 N. La Salle St., who filed
were liquidated. No payment has been made on this claim.
willing to wait for payment until some of his other claims
rendered in November 1937. Limore stated Atty. Jordan was
Clark St. filed claim of \$75.00 against Limore for services

"In June 1938, Harry Garvey, 3544 S. California Ave., a brother of Frank J. Garvey, filed claim for \$35.00 against Elmore for cash loan made a year previous. On July 9th, 1938, Elmore came to this office and presented a currency check receipt #242080 for \$5.00 made out to Harry Garvey. On July 23rd, 1938, Harry Garvey stated this currency check was never received by him.

"On July 8th, 1938, Mrs. Jennie Coleman, 210 N. Keystone Ave., filed claim for \$80.00 representing June and July 1938 rent of a bungalow at 5730 Melrose St., occupied by Elmore. It is not known whether Elmore has made any subsequent payment.

"On July 22nd, 1938, Tower Finance Corp., 40 N. Dearborn St., filed claim for \$100.00 and interest against Elmore for cash loan made May 18th, 1938, upon which no payment had been made.

"Since January 1935, Elmore has been suspended from duty six times for failure to make payment as agreed on claims filed against him without result as he fails to remit the \$25.00 each payday with any degree of regularity and additional claims are continually being filed against him.

"C O P Y

"July 21, 1938.

"From: Department Inspector.

"To: Commissioner of Police.

"Subject: Ptlm. Charles Elmore, 35th District.
Charges against.

"The above named officer has a number of claims on file in this office upon which he has consistently failed to make payments as agreed. He was ordered to appear in this office each payday with \$25.00 to be disbursed to his various creditors but has failed to comply on numerous occasions and has advanced no valid reason for his failure.

no valid reason for his failure.

but has failed to comply on many occasions and has advanced each payday with \$25.00 to be disbursed to his various creditors in this office upon which he has constantly failed to make payments as agreed. He was ordered to appear in this office

"The above named officer has a number of claims on file

"Subject: Palm, Charles Winore, 37th District.
Charges against."

"To: Commissioner of Police."

"From: Department Inspector."

"July 21, 1938."

"C O P Y"

continually being filed against him.

payday with any degree of regularity and additional claims are

against him without result as he fails to remit the \$25.00 each six times for failure to make payment as agreed on claims filed since January 1937. Limore has been suspended from duty

made.

cash loan made May 18th, 1938, upon which no payment had been

it, filed claim for \$100.00 and interest against Limore for

"On July 22nd, 1938, Tower Finance Corp., 40 N. Dearborn

is not known whether Limore has made any subsequent payment.

rent of a bungalow at 2730 Madison St., occupied by Limore. It

ave., filed claim for \$30.00 representing June and July 1938

"On July 8th, 1938, Mrs. Jennie Coleman, 210 N. Keystone

was never received by him.

July 23rd, 1938, Harry Garvey stated this currency check

received #242080 for \$5.00 made out to Harry Garvey. On

Limore came to this office and presented a currency check

Limore for cash loan made a year previous. On July 9th, 1938,

a brother of Frank J. Garvey, filed claim for \$25.00 against

"In June 1938, Harry Garvey, 3244 E. California Ave.,

"In this connection, would advise this officer filed a petition in bankruptcy several years ago scheduling over a thousand dollars in debts. After filing petition in bankruptcy claims which amount to about \$500.00 were received in this office, the major amounts being for cash loans.

"Due to the foregoing it is recommended that charges of failure to pay a just indebtedness and disobedience of orders be preferred against Ptlm. Elmore and referred to the Civil Service Commission.

"(Signed) Edwin J. Daly,
"Department Inspector."

The record then shows the following:

"IN THE MATTER OF CHARGES AGAINST CHARLES E. ELMORE:

"FINDINGS AND DECISION

"And now, the Civil Service Commission of the City of Chicago, having met in Room 612 City Hall, on the 10th day of August, 1938, for the purpose of investigating the foregoing charges, proceeded to hear and did hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission.

"And upon conclusion of all the evidence and argument, the Commission, being fully advised, finds that the following charges were filed against Charles E. Elmore in due form of law on the 2nd day of August 1938:

"Violation of the following sections of Rule 289, Rules and Regulations of the Department of Police, City of Chicago, promulgated and in force and effect January 22nd, 1934, viz:

"Section 3: Conduct unbecoming a police officer or employee of the Police Department.

"Section 33: Neglect to pay, within a reasonable time, a just indebtedness incurred while in the service.

"SPECIFICATIONS

"It is charged that Charles E. Elmore, Patrolman, assigned

"In this connection, would advise this officer filed a petition in bankruptcy several years ago scheduling over a thousand dollars in debts. His filing petition in bankruptcy claims which amount to about \$200.00 were received in this office, the major amounts being for cash loans.

"Due to the fact that it is recommended that charges of failure to pay a just indebtedness and disobedience of orders be preferred against him, Limore and referred to the Civil Service Commission.

"(Signed) Martin J. Daly,
Department Head."

The record then shows the following:

"IN THE MATTER OF CHARGES AGAINST CHARLES H. LIMORE:

"FINDINGS AND DECISION"

"And now, the Civil Service Commission of the City of Chicago, having met in Room 612 City Hall, on the 10th day of August, 1938, for the purpose of investigating the foregoing charges, proceeded to hear and did hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission,

"and upon consideration of all the evidence and argument, the Commission, being fully advised, finds that the following charges were filed against Charles H. Limore in the form of law on the 2nd day of August 1938:

"Violation of the following sections of Rule 289, Rules and Regulations of the Department of Police, City of Chicago, promulgated and in force and effect January 22nd, 1934, viz:

"Section 3: Conduct unbecoming a police officer or employee of the Police Department,

"Section 33: Neglect to pay, within a reasonable time, a just indebtedness incurred while in the service,

"RECOMMENDATIONS"

"It is charged that Charles H. Limore, Patrolman, assigned

to the 35th District, in the Department of Police, City of Chicago, did incur indebtedness to

Frank J. Garvey	3451 W. 21st St.	\$225.00
Thomas J. Jordan	139 N. Clark Street	75.00
A. G. Meier & Co.	205 W. Monroe Street	20.00
Helen Busse	336 S. Illinois St.	
	Villa Park, Ill.	50.00
S. I. Frank & Sons	2412 W. North Avenue	30.00
Harry Garvey	3544 S. California Ave.	35.00
Mrs. Jennie Coleman	210 N. Keystone Ave.	?
Tower Finance Corp.	40 N. Dearborn St.	100.00

which he has failed to pay; that the said Patrolman Charles E. Elmore has no just or valid reason or excuse for his failure to pay said indebtedness, and has no meritorious defense against the claims made against him for the said indebtedness by

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

that the said Patrolman Charles E. Elmore has persistently refused to pay his said indebtedness to the said

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.,

and has by reason of his said refusal tended to impair his own efficiency in the discharge of his police duties, and has reflected discredit upon the honesty and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago and for the support and maintenance of their homes and families.

to the 35th District, in the Department of Police, City of Chicago, did incur indebtedness to

100.00	40 N. Dearborn St.	Tower Finance Corp.
35.00	110 N. Kaystone Ave.	Mrs. Jennie Coleman
35.00	344 E. California Ave.	Harry Garvey
30.00	2412 E. North Avenue	S. I. Frank & Sons
20.00	4112 S. Illinois St.	Helen Brasse
20.00	307 N. Monroe Street	A. G. Meier & Co.
75.00	130 N. Clark Street	Thomas J. Jordan
2225.00	3451 W. 1st St.	Frank J. Garvey

which he has failed to pay; that the said Patrolman Charles W. Limore has no just or valid reason or excuse for his failure to pay said indebtedness, and has no meritorious defense against the claims made against him for the said indebtedness by

Tower Finance Corp.
Mrs. Jennie Coleman
Harry Garvey
S. I. Frank & Sons
Helen Brasse
A. G. Meier & Co.
Thomas J. Jordan
Frank J. Garvey

that the said Patrolman Charles W. Limore has repeatedly refused to pay his said indebtedness to the said

Tower Finance Corp.
Mrs. Jennie Coleman
Harry Garvey
S. I. Frank & Sons
Helen Brasse
A. G. Meier & Co.
Thomas J. Jordan
Frank J. Garvey

and has by reason of his said refusal tended to impair his own efficiency in the discharge of his police duties, and has reflected discredit upon the honesty and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago and for the support and maintenance of their homes and families.

"The Commission further finds that thereafter due notice was served upon the said Charles E. Elmore on the 4th day of August, 1938, by delivering a copy of said notice to the said Charles E. Elmore, which notice is in words and figures as follows:

"CIVIL SERVICE COMMISSION

"CITY OF CHICAGO

"CHICAGO, July 29th, 1938.

"TO: Charles E. Elmore (Patrolman)
"5730 W. Melrose Street

"Sir:

"You are hereby notified that charges(a copy of which is hereto attached) have been filed against you before the Civil Service Commission by the Commissioner of Police, under Section 12 of the Civil Service Act (Removals), and that the Commission has ordered that a hearing be had on said charges in Room 612 City Hall, on the 10th day of August, 1938, at 10 o'clock A. M., at which time and place you may appear and be heard in your defense, if you see fit.

"By Order Of The Commission:

"(Signed) J. S. Osborne,
"Secretary.

"The Commission further finds that together with said notice a copy of the foregoing charges was duly served upon the said Charles E. Elmore five days prior to this investigation; that the said Charles E. Elmore appeared in person at this hearing and was represented by counsel; that he and his counsel were present throughout and participated in the examination of witnesses; that all the witnesses were duly sworn, and testified.

"The Commission further finds that the said Charles E. Elmore on the 2nd day of August, 1938, was a Patrolman in the Department of Police of the City of Chicago.

"The Commission further finds that it has jurisdiction over the subject matter herein and of the person of the said

"The Commission further finds that thereafter due notice

was served upon the said Charles E. Limore on the 4th day of

August, 1938, by delivering a copy of said notice to the said

Charles E. Limore, which notice is in words and figures as follows:

"CIVIL SERVICE COMMISSION

"CITY OF CHICAGO

"CHICAGO, July 29th, 1938.

"TO: Charles E. Limore (Petitioner)
"3330 N. Halsted Street

"SIR:

"You are hereby notified that charges (a copy of which is

hereto attached) have been filed against you before the Civil

Service Commission by the Commissioner of Police, under Section 12

of the Civil Service Act (Removals), and that the Commission has

ordered that a hearing be had on said charges in Room 612 City

Hall, on the 10th day of August, 1938, at 10 o'clock A. M., at

which time and place you may appear and be heard in your defense,

if you see fit.

"By Order of the Commission:

"(Signed) J. S. Osborne,
"Secretary.

"The Commission further finds that together with said notice

a copy of the foregoing charges was duly served upon the said

Charles E. Limore five days prior to this investigation; that

the said Charles E. Limore appeared in person at this hearing and

was represented by counsel; that he and his counsel were present

throughout and participated in the examination of witnesses; that

all the witnesses were duly sworn, and testified.

"The Commission further finds that the said Charles E.

Limore on the 2nd day of August, 1938, was a Patrolman in the

Department of Police of the City of Chicago.

"The Commission further finds that it has jurisdiction

over the subject matter herein and of the person of the said

Charles E. Elmore; and from a consideration of all the evidence before it, the Commission finds the said Charles E. Elmore guilty of the following:

"1. Conduct unbecoming a police officer;

"2. Neglect to pay within a reasonable time a just debt incurred while in the service.

"In that the Commission finds by a preponderance of all the evidence, that Charles E. Elmore was on the 10th day of August, 1938, and prior thereto from the 3rd day of January, 1930, a member of the police department of the City of Chicago, assigned on the 10th day of August, 1938, to the 35th District of said department;

"Since January, 1935, various claims have been filed with the Police Department against the respondent because the respondent has failed to pay debts incurred by him, which are just debts;

"The respondent was sent to the Department Inspector's office to adjust those claims. A budget was prepared in said office for the respondent and the respondent agreed to pay \$25.00 out of each pay check of \$100.00 to liquidate said indebtedness. This the respondent subsequently failed and refused to do.

"1. Claim of \$75.00 was filed against the respondent by Thomas J. Jordan, a just debt which the respondent refused to pay.

"2. A. G. Meier & Co. filed a claim of \$58.86, a just debt against the respondent, Dec. 10, 1936, and a balance of \$20.00 remains, which he has failed and refused to pay.

"3. Helen M. Busse, filed claim of \$50.00 for rent on flat, a just debt, which he refuses to pay.

"4. A claim of \$30.00 remains unpaid on a just claim

Charles E. Moore; and from a consideration of all the evidence before it, the Commission finds that Charles E.

Moore failed to pay.

1. Amount of \$100.00.

2. Amount of \$100.00.

Amount of \$100.00.

In that the Commission finds by a preponderance of all the evidence, that Charles E. Moore was on the 10th day of August, 1936, and prior thereto from the 1st day of January, 1936, a member of the Police Department of the City of Chicago, and that on the 10th day of August, 1936, he was notified of said department.

Wherefore, the Commission finds that Charles E. Moore failed to pay the Police Department of the City of Chicago the amount of \$100.00, which was due and payable by him, and which was not paid.

The respondent was sent to the Department of Public Safety to adjust those claims, a warrant was issued in said office for the respondent and the respondent agreed to pay \$100.00 out of each pay check of \$100.00 so indicated until the amount of \$100.00 was paid.

1. Claim of \$100.00 was filed against the respondent by Charles E. Moore, a first class agent, on August 10, 1936.

pay.

2. A. D. Moore & Co. filed a claim of \$100.00, a first class agent, on August 10, 1936, and a balance of \$100.00 was paid, which he has failed and refused to pay.

3. John W. Moore, filed a claim of \$100.00 for work on August 10, 1936, which he has failed to pay.

4. A claim of \$100.00 for work on August 10, 1936.

of \$40.00 made by S. I. Frank & Sons, which he refuses to pay.

"5. Harry Garvey made a just claim of \$35.00 against the respondent for a cash loan, and the respondent presented a currency receipt check to Inspector Daley of the Personnel Department saying he had sent \$5.00 to Harry Garvey, but in fact he did not send the \$5.00 check. That respondent made that statement to wilfully deceive the Department Inspector.

"6. That respondent owes Mrs. Jennie Coleman \$80.00 for 2 months house rent, which he refuses to pay, a just debt.

"7. That respondent owes \$100.00 to the Tower Finance Corp., a just debt, which he refuses to pay.

"That the respondent has been suspended six times from the service for failure to pay his honest debts. The periods are as follows: January 8, 1935, February 9, 1935, November 19, 1935, July 31, 1936, January 17, 1937 and December 8, 1937.

"That the failure of the respondent to pay these honest debts is due to dishonesty;

"That claims continuously flow into the Department for the respondent's failure to pay just debts;

"The respondent in June, 1937, gave three checks to the Belmont-Central Currency Exchange, for which he received cash, when the respondent had no funds in the banks, and well knew he had no account in the banks on which the checks were drawn;

"In June, 1937, the respondent drew a check on the Lakeview Trust and Savings Bank in favor of Charles Elmore for \$16.55, signed by Marvin R. Chase. Said check returned, 'No account.' The respondent redeemed a third check of like character for \$21.80, which was returned, 'No account.'

"The respondent did not attempt to explain these check episodes.

"On March 9th, 1938, the respondent bought merchandise from Freeman Brothers and cashed check for \$11.60, which was returned,

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Trust and Savings Bank in favor of Charles Moore for \$16.75, signed
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when the respondent had no funds in the banks, and well knew he
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"The respondent in June, 1937, gave three checks to the
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"That claims continuously flow into the Department for the
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"7. That respondent owes \$100.00 to the Tower Finance Corp.,
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"6. That respondent owes Mrs. Jennie Coleman \$80.00 for 2
deceive the Department Inspector.
\$7.00 check. That respondent made that statement to wilfully
he had sent \$2.00 to Harry Garvey, but in fact he did not send the
receipt check to Inspector Daley of the Personnel Department saying
respondent for a cash loan, and the respondent presented a currency
"5. Harry Garvey made a just claim of \$35.00 against the
of \$40.00 made by S. I. Frank & Sons, which he refuses to pay.

'No account.' Respondent promised to redeem said check but has failed and refused to redeem it, until forced to do so by the Inspector of the Police Department;

"That said conduct is good cause for the removal of the respondent from his position;

"Therefore, by virtue of the findings of facts and guilt herein, it is here and now ordered, that the respondent, Charles E. Elmore, be and he is here and now discharged from his said position as a Patrolman in the Chicago Police Department and from the service of the City of Chicago.

"(Signed) Joseph P. Geary,
" " John E. Brennan,
" " Wendell E. Green,
" Civil Service Commissioners.

"Chicago, Illinois

"August 10, 1938

"Commissioners Joseph J. Geary,
"John E. Brennan,
"Wendell E. Green."

The counsel for relator concedes, as he must, "that the courts can only inquire whether the Civil Service Commission had jurisdiction and proceeded legally; that the court cannot substitute its discretion for, nor interfere with the discretion of the commission; that the court cannot weigh the evidence introduced before the commission and that the commission determines what is cause for removal. With these statements as general propositions of law, plaintiff here makes no particular objection." In support of the relator's contention that "the charges filed before the Civil Service Commission against the plaintiff do not furnish sufficient grounds for his removal and do not constitute legal cause for removal within the meaning of Section 12 of the City Civil Service Act," the able counsel for relator assumes that the sole charges made against the relator appear under the heading "Charges." The "Charges" and "Specifications," together, constitute the charges made against the relator.

"No account." Respondent promised to redeem said check but has failed and refused to redeem it, until forced to do so by the Inspector of the Police Department;

"That said conduct is good cause for the removal of the respondent from his position;

"Therefore, by virtue of the findings of facts and guilt herein, it is hereby ordered, that the respondent, Charles E. Limore, be and he is here and now discharged from his said position as a Patrolman in the Chicago Police Department and from the service of the City of Chicago.

"(Signed) Joseph J. Goany,
John E. Brennan,
Lambert E. Green,
Civil Service Commission."

"Chicago, Illinois
August 10, 1938
Commissioners Joseph J. Goany,
John E. Brennan,
and Lambert E. Green."

The counsel for relator concedes, as he must, "that the courts can only inquire whether the Civil Service Commission had jurisdiction and proceeded legally; that the court cannot substitute its discretion for, nor interfere with the discretion of the commission; that the court cannot weigh the evidence introduced before the commission and that the commission determines what is cause for removal. With these statements as general propositions of law, Plaintiff has no particular objection." In support of the relator's contention that "the charges filed before the Civil Service Commission against the Plaintiff do not furnish sufficient grounds for his removal and do not constitute legal cause for removal within the meaning of Section 12 of the City Civil Service Act," the able counsel for relator assumes that the sole charges made against the relator appear under the heading "Charges." The "Charges" and "Specifics" together, constitute the charges made against the relator.

What is the nature of the proceeding before the Civil Service Commission, and what is necessary to constitute a sufficient charge against the relator? In Joyce v. City of Chicago, 216 Ill. 466, the court said (pp. 471, 472): "This proceeding is not a common law or criminal proceeding, but an investigation. While the plaintiff in error had the right to have the charge preferred against him reduced to writing and in such form that he could clearly understand the ground assigned for his removal, it was not necessary that the charge should be formulated in technical language similar to that of a declaration or indictment. In State v. Common Council of the City of Superior, 90 Wis. 612, charges were filed with the common council against the mayor of the city for extorting sums of money from policemen and firemen for political purposes. After a hearing upon the charges the common council removed the mayor from office. Under the Wisconsin statute the mayor could not be so removed 'without cause, nor unless charges are preferred against him and an opportunity given him to be heard in his own defense.' The court, on page 622, said: 'This was not a common law trial, but an investigation. While the mayor had a right to insist that he have a fair hearing and that the substance of the rules governing trials at law should be preserved, he cannot require that the same precision and formality be observed which are required in criminal trials at law. These principles govern the charges made as well as the procedure. The charge does not need to be drawn with the accuracy of an indictment. It is sufficient if the accused be furnished with the substance of the charge against him.' Upon the trial the plaintiff in error was represented by counsel, and no objections, as appears from the record filed as a return, were made to the written charge, for indefiniteness or otherwise, and it is too late now for him

What is the nature of the proceeding before the Civil Service Commission, and what is necessary to constitute a writ of habeas corpus against the relator? In Ex parte v. City of Chicago, 216 Ill. 466, the court said (pp. 471, 472): "This proceeding is not a common law or criminal proceeding, but an investigation. While the plaintiff in error had the right to have the charge preferred against him removed to writing, and in such form that he could clearly understand the ground assigned for his removal, it was not necessary that the charge should be formulated in technical language similar to that of a declaration or indictment. In Ex parte v. Common Council of the City of Chicago, 90 Ill. 612, charges were filed with the common council against the mayor of the city for extorting sums of money from policemen and firemen for political purposes. After a hearing upon the charges the common council removed the mayor from office. Under the Wisconsin statute the mayor could not be so removed without cause, nor unless charges are preferred against him and an opportunity given him to be heard in his own defense." The court, on page 622, said: "This was not a common law trial, but an investigation. While the mayor had a right to insist that he have a fair hearing and that the substance of the rules governing trials at law should be preserved, he cannot require that the same precision and formality be observed which are required in criminal trials at law. These principles govern the charges made as well as the procedure. The charge does not need to be drawn with the accuracy of an indictment. It is sufficient if the accused be furnished with the substance of the charge against him." Upon the trial the plaintiff in error was represented by counsel, and no objections, as appears from the record filed as a return, were made to the written charge, for indefiniteness or otherwise, and it is too late now for him

to raise the objection that the complaint was not sufficiently specific. In State v. Kirkwood, 15 Wash. 298, the relator was removed from the office of police commissioner of the city of Seattle by the mayor upon charges, and Kirkwood was appointed in his place. The relator brought suit in the form of an information in the nature of a quo warranto to oust Kirkwood. The court held that in a quo warranto proceeding it could examine the sufficiency of the charges, and said (p. 300): 'The second contention of appellant, however, viz., that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no motion was made to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite and not specific. * * * The complaint * * * is somewhat discursive and indefinite, but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer.'" The position of counsel for the relator is that "the plaintiff was not charged with or found guilty of neglect to pay a debt when he had the ability to do so."

All must agree that if a person owes a just debt and does not pay it because he is unable to pay it, he is not dishonest; but if he owes a just debt and refuses to pay it when he has the ability to pay it he is dishonest. The specifications in the instant case not only charged that the relator incurred indebtedness and failed to pay the same, but "that the said Patrolman Charles E. Elmore has no just or valid reason or excuse for his failure to pay said indebtedness;" that he "has persist-

to raise the objection that the complaint was not sufficiently specific. In State v. Kirkwood, 17 Wash. 193, the relator was removed from the office of police commissioner of the city of Seattle by the mayor upon charges, and Kirkwood was appointed in his place. The relator brought suit in the form of an information in the nature of a quo warranto to oust Kirkwood. The court held that in a quo warranto proceeding it could examine the sufficiency of the charges, and said (200): "The second contention of appellant, viz., that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no action was taken to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite and not specific. * * * The complaint * * * is somewhat dissuasive and indefinite, but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer." The position of counsel for the relator is that "the plaintiff was not charged with or found guilty of neglect to pay a debt but in the ability to do so."

All must agree that if a person owes a just debt and does not pay it because he is unable to pay it, he is not dishonest; but if he owes a just debt and refuses to pay it when he has the ability to pay it he is dishonest. The specifications in the instant case not only charged that the relator incurred indebtedness and failed to pay the same, but "that the said Patrolman Charles E. Brown has no just or valid reason or excuse for his failure to pay said indebtedness," that he "has persist-

ently refused to pay his said indebtedness." The specifications apprised the relator that he was charged with being a dead-beat, and they charged "that the failure of the respondent to pay these honest debts is due to dishonesty." The specifications also charged that the relator cashed three checks with the Belmont-Central Currency Exchange which were returned "no account," and that he cashed a check with Freeman Bros. which was returned "no account." These charges as to cashing checks charged the relator with serious criminal acts. The specifications further charged him with lying to his superior officer and with deceiving the Commission. They further charged that the relator was suspended from duty six times for failure to make payments as agreed on claims filed against him, and that "additional claims are continually being filed against him." The specifications further charged that he filed a petition in bankruptcy and scheduled approximately \$1,500 in debts, the major part of which was made up of rent and cash loans. Other charges are contained in the specifications, but it is unnecessary to detail them. The claim of counsel for the relator that the charges filed before the Civil Service Commission against relator do not furnish sufficient grounds for his removal is without the slightest merit. The record of the Civil Service Commissioners shows that the relator was represented at the hearing by counsel, and there is nothing in the record to show that the point now made was raised before the Commission. We feel impelled to say that the counsel defending the relator must have been embarrassed by the number and the seriousness of the charges made. No point is made that the findings of the Civil Service Commission would not warrant the discharge of the relator. It would be a serious reflection upon the administration of justice if the courts of this county compelled the City of Chicago and the Civil Service Commissioners to reinstate the relator as a member of the police department

entirely refused to pay his said indebtedness." The specifications apprised the relator that he was charged with being a dead-beat, and they charged "that the failure of the respondent to pay these honest debts is due to dishonesty." The specifications also charged that the relator cashed three checks with the Belmont Central Currency Exchange which were returned "no account," and that he cashed a check with Western Bros. which was returned "no account." These charges as to cashing checks covered the relator with serious criminal acts. The specifications further charged him with lying to his superior officer and with deceiving the Commission. They further charged that the relator was suspended from duty six times for failure to make payments as agreed on claims filed against him, and that "additional claims are continually being filed against him." The specifications further charged that he filed a petition in bankruptcy, and scheduled approximately \$1,500 in debts, the major part of which was made up of rent and cash loans. Other charges are contained in the specifications, but it is unnecessary to detail them. The claim of counsel for the relator that the charges filed before the Civil Service Commission against relator do not furnish sufficient grounds for his removal is without the slightest merit. The record of the Civil Service Commission shows that the relator was represented at the hearing by counsel, and there is nothing in the record to show that the point now made was raised before the Commission. We feel inclined to say that the counsel defending the relator must have been embarrassed by the number and the seriousness of the charges made. To print is not that the findings of the Civil Service Commission would not warrant the discharge of the relator. It would be a serious reflection upon the administration of justice if the courts of this country compelled the City of Chicago and the Civil Service Commission to relegate the relator to a member of the police department.

of the City of Chicago. We are impressed by the charge made by the commissioner of police to the Civil Service Commission that the relator "has reflected discredit upon the honesty and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families." In this connection it must be noted that the pay of a police officer cannot be garnisheed, and it is therefore necessary for the police department to insist that its members act honestly in their dealings with others.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded with directionsto the trial court to dismiss the petition for mandamus.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

of the City of Chicago, as are represented by the Chicago Board of Police Commissioners, by the Commissioner of Police to the Civil Service Commission, that the Mayor "has requested disbursement of the money and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transportation of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families." In this connection it must be noted that the pay of a police officer cannot be withheld, and it is therefore necessary for the police department to insist that its members not honestly in their dealings with others. The fragment of the present count of Cook County is reversed and the case is remanded with directions to the trial court to dismiss the petition for mandamus.

THOMAS A. WOOD AND C. L. BROWN, JR., ATTORNEYS AT LAW,
CHICAGO, ILL.

Sullivan and Friend, Jr., counsel.

81
169
FROM MUNICIPAL

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APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

314 I.A. 195

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

October 15, 1940, plaintiff had judgment by confession against three defendants on a promissory note in the sum of \$466.50, \$67.37 of which represented attorneys' fees. Execution issued and was served on John Hinko, one of the defendants, November 13, 1940. Thereafter, November 19, 1940, he made a motion, supported by affidavit, that the judgment be opened, and was given leave to appear and defend. He filed his appearance and answer, and demanded trial by jury, and at the same time interposed a counterclaim against plaintiff. Plaintiff's motion to strike his answer and counterclaim were allowed, and the judgment previously entered was affirmed. Defendant John Hinko appeals.

It appears that in May, 1929, Nicholas and Katrzyna Sklar applied to plaintiff for a loan of \$500, which they needed for the purpose of making payments on some property owned by them. Being doubtful as to their financial responsibility, plaintiff indicated that he would make the loan if the Sklars could find a responsible party to sign a judgment note with them as comaker. Thereupon the Sklars went to plaintiff's home with John Hinko, and advised plaintiff that they were prepared to execute the note. The parties went to a real estate office, where the following note was made:



41758

D. SUKOWICZ,  
Appellee,

v.

JOHN NINKO, NICHOLAS SKLAR  
and KATRYNA SKLAR,  
Appellants,

APPEAL OF JOHN NINKO.

OFFICE OF THE CLERK  
COURT OF CHICAGO.

3141A.195

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

October 15, 1940, plaintiff had judgment by confession

against the defendants on a promissory note in the sum of \$466.50, \$67.37 of which represented attorneys' fees, execution issued and was served on John Ninko, one of the defendants, November 13, 1940. Thereafter, November 19, 1940, he made a motion, supported by affidavit, that the judgment be opened, and was given leave to appear and defend. He filed his answer and answer, and demanded trial by jury, and at the same time interposed a counterclaim against plaintiff. Plaintiff's motion to strike his answer and counterclaim were allowed, and the judgment previously entered was affirmed. Defendant John Ninko appeals.

It appears that in May, 1939, Nicholas and Katryna Sklar applied to plaintiff for a loan of \$500, which they needed for the purpose of making payments on some property owned by them. Being doubtful as to their financial responsibility, plaintiff indicated that he would make the loan if the Sklars could find a responsible party to whom a judgment note with them as co-maker. Thereupon the Sklars went to plaintiff's home with John Ninko, and advised plaintiff that they were prepared to execute the note. The parties went to a real estate office, where the following note was made:

\*\$500.00

Chicago May 31st, 1929.

Ninety days after date, for value received, we promise to pay to the order of D. Sukowicz, Five Hundred and no/100 Dollars, at his home, with interest at 6 per cent. per annum after maturity until paid.

And to secure the payment of said amount we hereby authorize, irrevocably, any attorney of any Court of Record to appear for us in such Court, in term time or vacation, at any time after maturity and confess a judgment, without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and reasonable attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

John Hinko  
No. 9316 Kimbark

Nicholas Sklar  
Katrzyzna Sklar"

The signatures of Nicholas and Katrzyzna Sklar appear in the lower right corner of the note, and Hinko's signature appears opposite their names in the lower left-hand corner. There is nothing on the face of the note indicating whether Hinko signed as maker or indorser, as he claims.

Although the note was payable, by its terms, 90 days after date, no payment was made thereon until December 8, 1930, when Sklar paid \$40 on account. No interest was then paid and plaintiff simply indorsed the receipt of \$40 on the back of the note as of December 8, 1930. Following this payment by Sklar, nothing was paid until May 26, 1937, almost eight years after date of the note, when Hinko, being threatened with suit, started to make payments thereon. Between that date and June 26, 1940, Hinko paid in excess of \$400 on account of principal. The judgment included the computation of interest at 6 per cent and

"\$500.00" 1930.00

... fifty days after date, for value received, to ...  
to pay to the order of B. ... five hundred and no/100  
Dollars, at his home, with interest at 6 per cent, per annum  
after maturity until paid.

And to secure the payment of said amount we hereby  
authorize, irrevocably, my attorney of any Court of Record  
to appear for us in such Court, in due time or vacation, at  
any time after maturity and confess a judgment, without pro-  
cess, in favor of the holder of this Note, for such amount as  
may appear to be unpaid thereon, together with costs and reason-  
able attorney's fees, and to waive and release all errors which  
may intervene in any such proceedings, and consent to immediate  
execution upon such judgment, hereby ratifying and confirming  
all that our said attorney may do by virtue hereof.

John Hinko  
No. 9316 Kimbark

Nicholas A. Sklar  
Katherine Sklar

The signatures of Nicholas and Kathryn Sklar appear in the lower  
right corner of the note, and Hinko's signature appears opposite  
their names in the lower left-hand corner. There is nothing on  
the face of the note indicating whether Hinko signed as maker or  
indorser, as he claims.

Although the note was payable, by its terms, 90 days after  
date, no payment was made thereon until December 8, 1930, when  
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was paid until May 26, 1937, almost eight years after date of  
the note, when Hinko, being threatened with suit, started to  
make payments thereon. Between that date and June 26, 1940,  
Hinko paid in excess of \$400 on account of principal. The  
judgment included the computation of interest at 6 per cent and



and aggregated \$399.13, to which was added \$67.37 attorneys' fees, or a total of \$466.50, for which amount the judgment was entered.

Hinko's affidavit in support of the motion to open the judgment alleged that he signed the note as an indorser; that he was never indebted to plaintiff; that at the maturity of the note no demand was made on the Sklars for payment, nor any protest made for nonpayment, nor notice given affiant of the dishonor of the note; that in March, 1937, plaintiff asked affiant to pay the principal, and an agreement was then made that if affiant would pay "at his convenience, upon the principal of such note," plaintiff would waive all interest; and Hinko alleged that the remainder of the principal was thereafter paid by him. Hinko further alleged that plaintiff had breached his agreement, and by way of defense he charged that one Carl Hutton, who appeared in behalf of defendants by his cognovit and confessed there was due plaintiff \$466.50 on the note and agreed "that no appeal or writ of error should be prosecuted on the said judgment or any bill in equity filed to interfere with the same \*\*\*, " exceeded his authority and thus rendered the judgment null and void.

Hinko's counterclaim again set forth the circumstances under which the note was signed, claiming to have executed it as an indorser, and he alleged the oral agreement with plaintiff, by which he had undertaken to pay the balance of the principal on condition that plaintiff would waive the interest provided for in the note; and because of plaintiff's breach of this agreement, hesought to recover, by way of counterclaim, the sum of \$405.62, which he had paid on account of principal, together with interest thereon amounting to \$35, or an aggregate of \$440.62.

and aggregate \$399.13, to which was added \$7.27 attorney's fees, or a total of \$406.40, for which amount the judgment was entered.

Plaintiff's affidavit in support of the motion to open the judgment alleged that he signed the note as an indorser; that he was never indebted to defendant; that at the maturity of the note no demand was made on the indorser for payment; nor any protest made for nonpayment; nor notice given plaintiff of the dishonor of the note; that in March, 1938, plaintiff asked defendant to pay the principal, and an agreement was then made that if plaintiff would pay "at his convenience, upon the principal of such note," plaintiff would waive all interest; and that plaintiff alleged that the remainder of the principal was thereafter paid by him. Plaintiff further alleged that defendant had breached his agreement, and by way of defense he charged that one Carl Hutton, who appeared in behalf of defendant by his counsel and confessed there was due plaintiff \$406.40 on the note and agreed "that no appeal or writ of error should be prosecuted on the said judgment or any bill in equity filed to interfere with the same \*\*\*," exceeded his authority and thus rendered the judgment null and void.

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It is urged that the cognovit attached to plaintiff's statement of claim exceeded the warrant of authority in that it provided "that no appeal or writ of error shall be prosecuted on the judgment or bill in equity filed to interfere with its operation," whereby the judgment was rendered void. While it may be conceded that the cognovit exceeded the warrant of attorney in the respect indicated, it does not appear that Hinko or the other defendants were prejudiced thereby. A similar situation was presented in Long v. Coffman, 230 Ill. App. 527, wherein it is held that a judgment by confession is not invalidated by the fact that the cognovit expressly released all errors in entering judgment, although the warrant of attorney in the note did not specifically authorize the attorney to release errors, since confession of judgment operates as a release of errors regardless of any such statement in the cognovit, and the rule of strict construction of the powers conferred by warrant does not apply, especially where no prejudice is shown. In First National Bank of New Paris, Ohio v. Royer, 273 Ill. App. 158, it was stated as a rule of law that where the cognovit, following a power granted in the warrant of attorney, expressly releases all errors, the effect is to waive or release all the errors in the proceedings, except such as affect the lack of jurisdiction to enter the judgment or the power under the warrant to confess the judgment.

The only defense sought to be interposed on the merits is that many years after the note became due, Hinko agreed to pay the balance of the principal on condition that plaintiff would waive the payment of interest, and Hinko's counsel contends that the question whether such an agreement was made should have been submitted to a jury. The note provided for payment of interest at 6 per cent, and whether Hinko be regarded as a maker or indorser, he was liable to pay both principal and interest according to the



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express provisions of the note in the event of default by the other two defendants. Since he was thus obligated, his promise to do what he was already bound to do furnished no valid consideration for plaintiff's alleged agreement to waive interest, and therefore Hinko was not entitled, as a matter of law, to have a jury pass on the existence of the alleged agreement.

The only other ground urged for reversal is that at maturity of the note, no demand was made on the Sklars for payment, no protest made for nonpayment, nor any notice given Hinko of the dishonor of the note. The note was payable, by its terms, at plaintiff's home. Since it was payable at a designated place, known to all the parties, no presentment for payment was necessary. Illinois Revised Statutes 1941, chap. 98, sec. 91.

It would follow from what has been said that Hinko is not entitled to recover on his counterclaim. Since he made payments on account of principal, we conceive no reason why he should be allowed to recover these payments with interest, and no authority is cited to support the contention made.

We find no convincing reason for reversal of the judgment of the Municipal court and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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We find no convincing reason for reversal of the judgment of the municipal court and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Scamman, J. J., and Sullivan, J., concur.



41767

MILLIE STOKES,  
Appellee,

v.

C. A. HANSBERRY,  
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

314 I.A. 195<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT,

Millie Stokes occupied a three-room kitchenette apartment with her family as a tenant in an apartment building alleged to be owned and operated by defendant, C. A. Hansberry, at 4246 Indiana avenue, Chicago, under the name of "Hansberry Enterprises." She brought suit in tort against defendant for an alleged assault upon her by one Lambert, who accompanied M. C. Hall on January 30, 1936 while serving a distress warrant on her because of arrears in rent, alleging in the second count of her complaint that Hall and Lambert were Hansberry's agents and that the assault was committed while they were "engaged upon the defendant's business and acting in the scope of their authority." The jury returned a verdict in favor of plaintiff for \$300 and costs. The court overruled defendant's motion for a directed verdict at the close of plaintiff's case and again at the close of all the evidence, as well as motions non obstante veredicto, for a new trial, and in arrest of judgment and entered judgment on the verdict, from which defendant has taken an appeal.

Defendant interposed the threefold defenses that (1) the evidence does not support the charge that an assault was committed; (2) that if an assault was committed, plaintiff brought suit against the wrong party, since defendant was not owner of the premises on the day in question, having conveyed his title thereto to Mrs. Louise Washington, his sister-in-law, some four months before the alleged assault; and (3) that plaintiff cannot recover because the relied on the doctrine of respondeat superior but

1757

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v.

C. A. HANSBERRY  
Appellant.

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OF CHICAGO

314 I.A. 195

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to Mrs. Louise Washington, his sister-in-law, some four months

before the alleged assault; and (3) that plaintiff cannot recover

because she relied on the doctrine of respondeat superior but

failed to prove the relationship of master and servant between defendant and the process servers.

The essential facts disclose that Hansberry operated several apartment buildings or hotels on the south side in Chicago. One of these was the building in question, which consisted of twelve kitchenette apartments, one of which was occupied by plaintiff and her family. A sign on the building bore the name "Hansberry Enterprises." Mrs. Louise Washington, wife of defendant's half brother, was in the office of the building and claimed to be the owner thereof. She testified that Hall was a member of the "All State Special Police Organization" and served as a watchman and special officer to guard the building, and that she directed him to serve a distress warrant on defendant. Hall met Lambert, another member of the "All State Special Police Organization," at 48th street and Michigan avenue, and on his own initiative took him along to plaintiff's apartment in serving the warrant. Mrs. Stokes testified that these two men first came to her apartment January 26, which was four days before the alleged assault, knocked on her door, and when she opened it, advised her that they were police officers, that Mr. Hansberry had sent them up there, and they told her that if she did not move from the premises the next day they would put her out. They thereupon left her apartment and returned the following day, both wearing uniforms. When they knocked on the door plaintiff held the knob and told them that they could not come in, "that is the bailiff's work." One of the men said, "That makes no difference," and entered her apartment. She stated that one of the officers, presumably Lambert, dragged her to the hall, kicked her in the ankle and inflicted other injuries on her body. The jury was undoubtedly justified in finding that plaintiff had been assaulted, because two other witnesses corroborated her testimony. One of these was Lydia Currie, who was visiting her



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her testimony. One of these was Lydia Gurtie, who was visiting her

son, who occupied another apartment in the building. She said that January 30, 1936, the day in question, she saw one of the men pass her apartment, and that she heard Mrs. Stokes say, "Oh, you hurt so." A doctor was called and plaintiff was ordered to bed. Mrs. Currie visited her daily thereafter while she was confined to her bed. Dr. D. H. Anderson, who attended her, testified that he had practised medicine for thirty-eight years and knew Mrs. Stokes and her family before the occurrence. He found Mrs. Stokes in a highly nervous condition, suffering from abrasions and contusions, and badly shaken up. These abrasions were located on the right shoulder, knee and ankle. He described them as severe at the time but did not consider them as permanent injuries. The patient was given some internal medicine, and bandages and dressings were applied to the injured parts. Thereafter he made eight or ten calls, dressed her wounds and gave her medication to relieve her pains. Lambert, who committed the assault, was absent from the city and did not appear as a witness at the trial. Hall denied that he had heard an altercation between Lambert and plaintiff, but Mrs. Washington testified that Hall came to the office, stating that Mrs. Stokes had "jumped" on some man, and asked her to call the police.

After the assault plaintiff requested her son to call the 48th Street Police Station. Policemen arrived in response to the call and asked either Hall or Lambert, "Did you hit that lady?" One of them replied, "I did not hit her." The police officer then propounded the same question to the other process server, who said, "Yes, Mr. Hansberry sent us up to put her out." The officers then took both process servers to the police station, and plaintiff testified that "They carried me there," and that Mr. Hansberry and Mr. Middleton were there. Police Lieutenant Middleton asked the process servers who sent them, and they

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replied, "Mr. Hansberry paid us." Middleton also asked Hansberry, "Why did you send those men to attack that young woman; why didn't you wait until her husband came in and talk with him?", to which he replied, "I told them to put her out, and not attack her."

It is urged by defendant that he was not the owner of the premises when the assault was committed, having conveyed title there- to to Mrs. Washington September 23, 1935, some four months prior to the assault. To sustain this contention defendant introduced in evi- dence a deed to Mrs. Washington, showing the conveyance. It was plaintiff's contention that this was a sham conveyance made by Hansberry in anticipation of a judgment that was entered against him in 1935. Mrs. Washington came to Chicago in 1934. She testified that she <sup>was</sup> at first employed as a clerk and later purchased the build- ing in question from Hansberry for \$18,000. She at first denied that she had bought other real estate from Hansberry but on cross-exami- nation, when confronted with another deed, she admitted the purchase of two other properties. Her testimony is so replete with contra- dictions that the jury was justified in concluding that she was not the owner of the premises in question. According to her testimony, she was to pay for the property at the rate of \$100 a month, to- gether with interest, and plaintiff's counsel says that on this basis it would take almost sixty years to complete the payments. When interrogated about the details of the transaction, Mrs. Washington could make no clear and comprehensive statement of the terms of the sale. Moreover, there is undisputed evidence that in March 1936, some two months after the assault, Hansberry collected rent from Mrs. Stokes and gave her a signed receipt therefor. The sign "Hansberry Enterprises" remained on the building after the alleged transfer, and so far as the record discloses is still there. Dr. Anderson testified that he saw the name on the building when he called to attend plaintiff, and there is substantial evidence of the fact that Hansberry exercised authority over Mrs. Washington,

the fact that Hansberry exercised authority over Mrs. Washington, Anderson testified that he saw the name on the building when he transferred, and so far as the record discloses is still there. Dr. "Hansberry Enterprises" remained on the building after the alleged Mrs. Stokes and gave her a signed receipt therefor. The sign some two months after the assault, Hansberry collected rent from sale. Moreover, there is undisputed evidence that in March 1936, could make no clear and comprehensive statement of the terms of the interrogated about the details of the transaction, Mrs. Washington it would take almost sixty years to complete the payments. When together with interest, and Plaintiff's counsel says that on this basis she was to pay for the property at the rate of \$100 a month, the owner of the premises in question. According to her testimony, dictions that the jury was justified in concluding that she was not of two other properties. Her testimony is so replete with contradictions, when confronted with another deed, she admitted the purchase she had bought other real estate from Hansberry but on cross-examination in question from Hansberry for \$18,000. She at first denied that that she <sup>was</sup> first employed as a clerk and later purchased the building in 1935. Mrs. Washington came to Chicago in 1934. She testified Hansberry in anticipation of a judgment that was entered against him Plaintiff's contention that this was a sham conveyance made by a deed to Mrs. Washington, showing the conveyance. It was the assault. To sustain this contention defendant introduced in evidence to Mrs. Washington September 23, 1935, some four months prior to premises when the assault was committed, having conveyed title there- It is urged by defendant that he was not the owner of the he replied, "I told them to get her out, and not attack her." you wait until her husband came in and talk with him", to which "Why did you send those men to attack that young woman; why didn't replied, "Mr. Hansberry paid us." Middleton also asked Hansberry,



the building and tenants thereof after the assault.

Lastly it is urged that plaintiff cannot recover because she relied on the doctrine of respondeat superior but failed to prove the relationship of master and servant between Hansberry and the men who served the distress warrant on plaintiff. There is evidence that Hall, although a member of the All State Police, acted as a watchman for the building and was used by Hansberry to serve notices on tenants. If Hansberry was the real owner of the premises, as the jury had the right to conclude from the evidence, and if ~~that~~ either he or Mrs. Washington ordered Hall to serve the distress warrant, there could be no doubt as to the relationship of master and servant between Hansberry and Hall. Hall had been in Hansberry's employ before the transfer and continued in the same capacity until after the assault was committed. Mrs. Stokes testified that when Hall and Lambert first called on January 26 they told her that Hansberry sent them and requested her to move. There is also plaintiff's evidence that January 30 Hansberry had placed a padlock on the back door of her apartment and nailed down the windows. Hansberry, of course, denied this evidence and testified that he was absent from the city January 30, but it was the province of the jury to determine the facts, notwithstanding the conflict in the evidence.

Defendant cites and relies on several decisions, including Niles v. Marshall Field & Co., 218 Ill. App. 142, as supporting the proposition that Hansberry had no control over Hall or Lambert, since both of them were employees of the All State Police and therefore he could not be liable for torts committed by either of them. As members of the All State Police they were merely special officers limited in their activities to guarding or protecting buildings or property (Revised Chicago Code of 1931, as amended, sec. 3743). In seeking to evict plaintiff, however, Hall was nevertheless Hansberry's agent, because he had been ordered to



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serve the warrant, either by Hansberry himself or Mrs. Washington whom the jury evidently believed to be his employee. Although Lambert was not assigned to the building, he accompanied Hall in the performance of Hall's duty, and defendant cannot relieve himself of liability by disclaiming Lambert's services. In Niles v. Marshall Field & Co., supra, upon which defendant relies, one Rolands was assigned as house detective to Marshall Field & Company's department store by the superintendent of police upon the recommendation of <sup>Maguire &</sup> White Detective Agency, which had a contract with Field's for general police work, and while acting in the capacity of house detective he assaulted and arrested a customer, wrongfully charging her with having stolen certain merchandise. She brought suit against Field's, and by way of defense it was contended that Rolands was not Field's servant and that his relationship to Field's at the time was not such as to make the doctrine of respondeat superior applicable. It was shown upon trial that Field's paid the agency for detective service in the store and that Rolands was employed by and paid by the detective agency; and upon these facts the court held that Maguire & White, and not Marshall Field & Company, controlled Rolands' acts and therefore he was not an employee of defendant, who neither hired nor had authority to fire him. In the case at bar Hall was hired by Hansberry, was subject to his direction and orders, and was, in fact, his agent.

In City of Chicago v. O'Malley, 196 Ill. 197, one Moriarity was engaged as a bridge tender for the municipality, and on his own initiative he employed one O'Brien as a helper. O'Brien was not employed by the city, but by Moriarity without authority from the city, and was paid personally by Moriarity and could be discharged at Moriarity's pleasure. Some boys stepped upon the sidewalk of the bridge while it was being turned and O'Brien, in chasing them



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off, caused injury to one of the boys, who brought suit against the city. One of the contentions advanced was that the city could not be held liable for O'Brien's tortious acts since the latter was not a servant of the city, but the court held that if the acts of both Moriarity and O'Brien contributed to the injury, the city could not avoid liability by showing that O'Brien was not its servant, and the judgment against the city was accordingly affirmed. We think this case is applicable to the proceedings at bar. Lambert was Hall's helper and their combined acts resulted in the assault on plaintiff. Defendant cannot exculpate himself from liability by contending that Lambert was not employed by him.

The evidence in the case is sharply conflicting, and the record is replete with contradictions and denials of many of the essential facts, but it was the province of the jury to consider all the evidence and determine the facts. No serious criticism is made of the trial. Although the record does not contain the instructions to the jury, we assume that the jury were properly charged with respect to the questions of law interposed as a defense. We find no convincing reason for reversing the judgment and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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JUDGMENT AFFIRMED.

Scamman, P. J., and Sullivan, J., concur.

41826

B. A. ECKHART MILLING COMPANY,  
a corporation,

Appellee,

v.

ILLINOIS DOUGHNUT & CAKE COMPANY,  
a corporation,

Appellant.

83  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

314 I.A. 1961

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

B. A. Eckhart Milling Company brought suit against defendant in the sum of \$229.50 for flour sold and delivered in December 1939. This sale and the delivery of the merchandise is not questioned and defendant concedes that it was indebted to plaintiff for the amount claimed. However, defendant filed a counterclaim for \$573.50 based upon the failure of plaintiff to deliver 200 barrels of flour at \$4.25 a barrel under an agreement alleged to have been made August 15, 1939, as a result of which it purchased the flour elsewhere at advanced prices. The cause was heard by the court without a jury, resulting in a finding in favor of plaintiff on its statement of claim and against defendant on its counterclaim and the entry of judgment against defendant in the sum of \$229.50, from which this appeal is taken.

Although the record embraces some 300 pages of evidence, the essential facts may be briefly summarized as follows: Nick Doxas was employed as salesman for plaintiff with authority to take orders for the sale of its manufactured products. August 15, 1939 he secured a written order from defendant for 200 barrels of flour at \$4.25 a barrel. This order was signed by Doxas on behalf of plaintiff and by Nick Thomas on behalf of defendant. There appeared on the written order the following:



3141A.196  
OF CHICAGO.  
APPEAL FROM MUNICIPAL COURT  
v.  
ILLINOIS DOUGHNUT & CAKE COMPANY,  
a corporation.  
Appellant.  
Appellee,  
B. A. BECKHART MILLING COMPANY,  
a corporation.

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15, 1939 he secured a written order from defendant for 200  
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Doxas was employed as salesman for Plaintiff with authority to  
the essential facts may be briefly summarized as follows: Nick  
Although the record embraces some 300 pages of evidence,

"This contract constitutes the complete agreement between the parties hereto; and cannot be changed in any manner except in writing subscribed by Buyer and Seller or their duly authorized officers. (Conditions cont'd on the back hereof) This contract is subject to confirmation by the seller at CHICAGO, ILL." The last sentence is set out in boldface type and immediately precedes the signatures of the parties.

There is evidence that in conformity with the usual course of business the order was forwarded by Dexas to plaintiff's office in Chicago and August 15, 1939, and again August 16, plaintiff's representative notified defendant that it could not accept the order. Nick Thomas, defendant's president, admitted the revocation of the order by telephone. He testified that August 16 he received a call from plaintiff's manager. The price of flour had gone up somewhat immediately after the order had been taken. In that telephone conversation plaintiff's manager told Thomas he could not accept the price stipulated in the memorandum and wanted more money. "I told him it is a contract binding on both parties and I asked him to return it. When he told me the price had gone up I told him I don't care if the price had gone up, I said, 'Well, I want my flour.' Then he said ten cents more a barrel he wants. I said, 'I want my flour' and then I hung up on him." Thereafter defendant had conversations with Dexas and others over a period of time and finally, being unable to purchase the flour at \$4.25 a barrel, defendant obtained it elsewhere in small lots on different dates at advanced prices, and its counterclaim against plaintiff, alleging that the transaction of August 15, 1939 was an executed contract of sale which plaintiff had breached, is predicated on the damages resulting from those purchases at advanced prices.

The legal aspects of the case present little difficulty. The numerous cases cited by defendant are simply an application to sales transactions of the elementary law of offer and acceptance

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The legal aspects of the case present little difficulty. The numerous cases cited by defendant are simply an application to



found in the general law of contracts. The rule is well settled that where an order for goods or chattels is made subject to approval or acceptance, it merely constitutes an offer to contract which may be rejected by either side before it is accepted. In 55 C. J., at p. 81, the rule is set forth as follows: "An order for goods or chattels, until acceptance, is merely an offer or proposal to buy, particularly where the order is given to an agent of the seller and is made subject to the seller's approval or acceptance. It is merely an offer to contract and not a contract to sell or purchase." In the same volume, at p. 85, the author says that, "An order for goods or chattels given to an agent of the seller, subject to the latter's approval or acceptance, may be withdrawn or countermanded by the buyer at any time before it is accepted by the seller and such acceptance communicated to the buyer, even though the order provides that it cannot be countermanded either before or after acceptance," and in the same volume, at p. 90, we find the following: "A writing in the form of a contract of sale, entered into by one party and an agent of the other party, with the understanding or agreement that it is to be submitted to the agent's principal for approval or acceptance, is a mere offer to buy or sell, and does not constitute a complete contract of sale until it is so approved or accepted by the principal, and such approval or acceptance communicated to the other party to the writing, although a bill of sale of property to be taken in exchange accompanies the offer." Plaintiff cites numerous Illinois authorities supporting this rule; none is cited to the contrary. Abrahams v. Weiller, 87 Ill. 179; Greenhood v. Keator, 9 Ill. App. 183; Martin & Co. v. Wilms, 61 Ill. App. 108; Estate Stove Company v. Kenney et al., 234 Ill. App. 366; Alexander Hamilton Institute v. Jones, 234 Ill. App. 444; Stimpson Computing Scale Co. v. Ehmsen, 246 Ill. App. 271.

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The only fair conclusion to be drawn from the evidence is that Doxas was authorized to take orders but had no authority to consummate a sale. All orders taken by him were subject to confirmation by the seller, his principal. The evidence is likewise clear that he took the order in question and forwarded it to plaintiff's office. Defendant's president admits that on the 15th of August, the date the order bears, and again on August 16, plaintiff rejected the offer. Under these circumstances there could be no contract of sale and consequently no breach thereof.

Defendant does not question these fundamental rules of law, but invokes the doctrine of estoppel by reason of the fact that on prior occasions Doxas had taken orders from defendant which were delivered without confirmation. Its counsel cite cases to the effect that if a principal, by his conduct toward third parties, causes them to reasonably believe that a party is his agent and authorized to contract for him, he will be estopped from denying the agent's authority. We find no evidence that would justify the application of this doctrine to the circumstances of this case. The fact that prior orders had been taken by Doxas and filled merely indicates that they were confirmed by plaintiff, but would not deprive plaintiff of reserving to itself the right of rejecting subsequent sales. There is nothing to suggest that Thomas was unaware of the conditions of the agreement, which are set forth in boldface type immediately above his signature. He was evidently an alert business man, could read, speak and understand English, and is presumed to have been aware of the provision in the memorandum which made it subject to confirmation by plaintiff.

The case was fairly tried and there is no dispute as to the salient facts. Holding as we do that the contract was never approved, but was rejected by plaintiff, it becomes unnecessary to discuss the measure of damages for which defendant contends under its counter-claim. Judgment of the Municipal court is, therefore, affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.



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41899

KLING-TITE PAINT PRODUCTS CO.,  
a corporation,

Appellee,

v.

COLUMBIA ICE & ICE CREAM COMPANY,  
a corporation,

Appellant.

85  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

314 I.A. 197

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover \$1,031.21, being the agreed purchase price for certain roofing material sold by it to defendant. After filing its affidavit of defense, defendant interposed a counterclaim for damages. The cause was heard by the court without a jury, resulting in a finding and judgment in favor of plaintiff for \$800 and against defendant upon its counterclaim, from which defendant appeals.

Briefly summarized, the facts disclose that defendant was in the business of manufacturing ice and ice cream in its plant at 1013 South Kedzie avenue, Chicago. Part of the plant was covered with a so-called spray deck or roof, which was designed to cool the roof by means of a continual spray of water thereon. Plaintiff was in the business of selling roofing materials and paints and had been so engaged for a number of years. In March or April 1939 J. O. Hummell, a sales representative of plaintiff, called at defendant's plant for the purpose of selling defendant certain roofing material. He entered into negotiations with Dan Egan, defendant's general manager, which culminated in the sale of the roofing material on which this suit is predicated. Defendant makes no denial of the purchase and concedes that if it is liable for plaintiff's claim, judgment in the sum of \$1,031.21 would have been warranted. Nevertheless, the court, for some reason which does not appear of record, awarded plaintiff the reduced sum of \$800.

Although the evidence is conflicting as to some of the

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a corporation,  
Appellee,

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COLUMBIA ICE & ICE CREAM COMPANY,  
a corporation,  
Appellant.

COUNT OF CHICAGO,  
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Although the evidence is conflicting as to some of the



issues involved in the transaction, we think the material facts upon which defendant relies by way of defense are fairly well established. Egan testified that maintenance of the plant was among the duties entrusted to him as general manager. Prior to this transaction defendant had on occasion purchased paint from plaintiff through a salesman whose name is not disclosed in Egan's testimony. Egan said that he was unaware of the fact that plaintiff sold roofing material as well as paint. When the need for roofing material was mentioned, this salesman suggested to Egan not to do anything "until I send one of our men about the roof." Shortly thereafter Hummell called on Egan and the two men, in the presence of Anthony J. Nargie, defendant's chief engineer, discussed the condition of defendant's roof and the kind of material required for the job. Egan and Nargie took Hummell up to inspect the roof and told him that their requirement was different from ordinary roofing by reason of the spray deck, which subjected the material to continual moisture. Egan said that Hummell thereupon said, "We have something very new on the market. I just got that job licked. I got just the material for it." He thereupon showed Egan two kinds of burlap, one thicker than the other. Egan asked Hummell whether it would not be better to use the thicker material, to which Hummell replied, "No, the thinner is better because it saturates the material and you will get the effect more." Egan then told him, "I don't know anything about it; whatever material you want to use is okay with me. I want a good job," to which Hummell replied, "You leave it to me. I will take care of the whole thing," and suggested that he would have a man there on the following day to start work. Egan testified that he, Hummell and Nargie spent about half an hour on the roof and that

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Hummell made a complete examination thereof.

Hummell testified that plaintiff corporation furnished only material, and not labor. When so advised, Egan inquired whether Hummell could get some man to apply the material and Hummell suggested one Otto Blank, whom he characterized as a "good workman." After leaving Egan, Hummell contacted Blank, who agreed to report to Egan, and subsequently did so. Egan furnished two of defendant's employees to help on the job, whose assistance consisted solely of carrying the material to the roof, where it was applied by Blank under Hummell's direction. Hummell admitted that he spent part of each day directing the work and was sometimes there from one to three hours at a time, leaving instructions to Blank for applying the material whenever he left the job. It took substantially two weeks to complete the application of the material. When Hummell first brought Blank over to Egan he said, "Here is a man who knows all about the work. All you got to furnish me is two laborers to carry merchandise back and forth. My man will apply it for you. You have to pay their time." Egan said that he consented to this arrangement and paid the help.

Hummell suggested that they allow the material to set before turning on the spray, and accordingly Hummell came over about two weeks later and the water was turned on. Egan testified that a day or two thereafter the material "starts running; getting in the condensing pipes; the roof started leaking." He wrote plaintiff a letter of complaint, and after that again talked to Hummell, who said, "Don't worry about a thing. We will fix it up." The leaking continued and Egan called plaintiff's office. Hummell was not in and Egan asked that one of the representatives of the company be sent over to the plant. Thereafter Hummell brought John Lavin, who, together with Nargie, went up to inspect the roof. Attempts by plaintiff to repair the leak, over a period of time, were unsuccessful. Egan testified that he talked to Lavin about



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payment of the bill and told him, "We do not want anything for nothing. We want to pay for the job if it is satisfactory; if you will put in the right material." At the same time he called Lavin's attention to the fact that the material was running through the pipes and damaging their products. On hearing, Egan testified that the plant needed a complete new roof, either because the material furnished by plaintiff, or the manner of applying it, rendered the roof wholly defective.

Defendant produced two expert witnesses. One of these, Joseph L. Kovarsky, testified that he was a roofing contractor and had been so engaged for some 25 years. He said that his company applied and poured roofs on all types of buildings, and that he had supervised many thousands of jobs. He had examined defendant's roof in October 1940 and found numerous leaks thereon. From an examination of the job he was of opinion that the material sold by plaintiff was an asphalt roof coating applied over burlap; that in some instances asphalt products are used and in others coal tar or pitch products are applied, and on occasions a combination of both; that on "built up" roofs either asphalt or tar is used, but this was not a "built up" roof and therefore he was of opinion that coal tar or pitch applied over felt, instead of canvas, should have been used. In answer to a question whether the leaky condition of the roof was caused by the material or the manner of application used, he replied that it was due to both.

Another witness, Leroy Young, likewise testified that he was a contractor, associated with Esko & Young for seven years, and that he had been in the roofing business since 1907. During that time he had occasion to build and repair roofs on all kinds of buildings, running into many thousands. He inspected defendant's roof in the early part of 1940 and found that it had been treated with a cold application of emulsified asphalt mixed with



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fibre. At the time of his examination, leaks appeared in many places. The top of the coating was deteriorating. He said the roof leaked because it was not waterproof. He had had considerable experience with spray decks and stated that because of the constant contact with water, asphalt material had never proved satisfactory for any length of time, and in his opinion the material used was not suitable for the desired purpose.

Lavin testified that when he was there he did not see any leaks. He had called on Egan several months after the job was completed to collect payment of the account, and admitted that Egan told him defendant would pay "when the roof was tight." It was Lavin's opinion that if there were any leaks, they might have been caused by expansion and contraction of the building, or might have been due to reasons other than the material used.

Hummell's version of his first conversation with Egan was substantially as follows: He admitted inspecting the roof and finding "a lot of dried out places." Egan asked him, "what can you do for it?" and Hummell replied, "Well, I can give you something here that would do some good," and he proceeded to tell him what he had, suggesting that the roof might from time to time develop a leak, but the material was guaranteed for five years and any time within that period plaintiff would furnish new material without any charge. With respect to the application of the roofing material, Hummell said that when he advised Egan plaintiff did not furnish labor, the latter asked him whether he could get some men, and he happened to think of Otto Blank, whom he recommended to Egan as a good workman. He thereupon contacted Blank immediately, brought him over to Egan, and was told to go ahead with the job. Hummell admitted that he was frequently present while the material was being applied and instructed Blank how to proceed.

The defense interposed is that there was an implied warranty

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by plaintiff that the material sold was reasonably fit for the purpose for which it was intended, under par. 15 (1) of chap. 121-1/2 of the Illinois Revised Statutes 1939, which provides that "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is as [an] implied warranty that the goods shall be reasonably fit for such purpose." It appears reasonably clear from a careful examination of the evidence that the implied warranty contended for was established by defendant's witnesses. Hummell's testimony does not negative this conclusion. Egan's testimony is corroborated by Hummell, in the more important aspects of the case. Egan knew little or nothing about roofing material, whereas Hummell, by reason of his experience, was thoroughly familiar with the subject. Egan explained to him the purpose for which the material was required, showed him the roof, which Hummell inspected, and it was Hummell who suggested the quality of material to be used and assured Egan it would prove satisfactory; otherwise it is difficult to believe that Egan would have ordered the quality of material employed. Moreover, Hummell recommended Otto Blank as a good workman who was familiar with applying the material, and Hummell was present from day to day directing or supervising the job. Under the circumstances, we think the defense interposed comes within the purview of the statute. A like situation was presented in Standard Paint Co. v. E. K. Vieter & Co., 120 Va. 595, 91 S. E. 752, where roofing material sold was represented as suitable for a nonleakable roof. As in the case at bar, numerous complaints were made by the purchaser of the material and attempts were made to remedy the leak, continuing over a period of several years. Thereafter the purchaser constructed a new roof and sued



by plaintiff that the material sold was reasonably fit for the purpose for which it was intended, under par. 17 (1) of chap. 121-1/2 of the Illinois Revised Statutes 1939, which provides that "here the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is as [an] implied warranty that the goods shall be reasonably fit for such purpose." It appears reasonably clear from a careful examination of the evidence that the implied warranty contended for was established by defendant's witnesses. Hummel's testimony does not negative this conclusion. Egan's testimony is corroborated by Hummel, in the more important aspects of the case. Egan knew little or nothing about roofing material, whereas Hummel, by reason of his experience, was thoroughly familiar with the subject. Egan explained to him the purpose for which the material was required, showed him the roof, which Hummel inspected, and it was Hummel who suggested the quality of material to be used and assured Egan it would prove satisfactory; otherwise it is difficult to believe that Egan would have ordered the quality of material employed. Moreover, Hummel recommended Otto Blank as a good workman who was familiar with applying the material, and Hummel was present from day to day directing or supervising the job. Under the circumstances, we think the defense interposed comes within the purview of the statute. A like situation was presented in Standard Paint Co. v. W. K. Vester & Co., 120 Va. 592, 91 S. W. 752, where roofing material sold was represented as suitable for a nonleakable roof. As in the case at bar, numerous complaints were made by the purchaser of the material and attempts were made to remedy the leak, continuing over a period of several years. Thereafter the purchaser constructed a new roof and sued

the vendor for the cost thereof. He had judgment and the reviewing court, in discussing the case, said that "It is perfectly well settled that when one sells an article of person<sup>al</sup> property, there is an implied guarantee that it shall be reasonably serviceable and fit for the peculiar uses to which the vendor knows it to be put [citing cases]; and it seems clear that, notwithstanding the written paper, inasmuch as it is perfectly certain that the vendor knew that the roofing was intended for buildings required to be watertight, it may be fairly inferred that there was this implied guarantee." Cases in this state dealing with the question of implied warranty are Mandel Bros. v. Mulvey, 230 Ill. App. 588; MacAndrews & Forbes Co. v. Mechanical Mfg. Co., 285 Ill. App. 81; American Spiral Pipe Works v. Universal Oil Products Co., 220 Ill. App. 383.

Plaintiff argues that if there was any warranty it was an express one and not implied. This contention is founded on the testimony of Hummell, wherein he told Egan that the material was guaranteed for five years and that if any leaks developed plaintiff would furnish new material without charge. Assuming there was such a warranty, it related solely to the quality of the material. However, the defense is predicated upon the theory that plaintiff sold the material with an implied warranty that it was reasonably serviceable and fit for the particular uses which Egan had explained to Hummell and with which the latter was thoroughly familiar, and that the material furnished by plaintiff was wholly unsuited for the job and was improperly applied under Hummell's supervision.

The record is silent as to why the court entered judgment for \$800, especially in view of defendant's admission that if liability existed plaintiff was entitled to the full sum of \$1,031.21. Although plaintiff's counsel argue that defendant has no cause to complain when it is required to respond in damages for a lesser sum than plaintiff is lawfully entitled to recover, the fact that

the vendor for the cost thereof. He had judgment and the reviewing court, in discussing the case, said that "It is perfectly well settled that when one sells an article of personal property, there is an implied guarantee that it shall be reasonably serviceable and fit for the peculiar uses to which the vendor knows it to be put [citing cases]; and it seems clear that, notwithstanding the written paper, inasmuch as it is perfectly certain that the vendor knew that the roofing was intended for buildings required to be watertight, it may be fairly inferred that there was this implied guarantee." Cases in this state dealing with the question of implied warranty are Mandel Bros. v. Wiley, 230 Ill. App. 588; MacAndrews & Forbes Co. v. Mechanical Mfg. Co., 285 Ill. App. 81; American Spiral Pipe Works v. Universal Oil Products Co., 220 Ill. App. 383.

Plaintiff argues that if there was any warranty it was an express one and not implied. This contention is founded on the testimony of Hummel, wherein he told Egan that the material was guaranteed for five years and that if any leaks developed plaintiff would furnish new material without charge. Assuming there was such a warranty, it related solely to the quality of the material. However, the defense is predicated upon the theory that plaintiff sold the material with an implied warranty that it was reasonably serviceable and fit for the particular uses which Egan had explained to Hummel and with which the latter was thoroughly familiar, and that the material furnished by plaintiff was wholly unsuited for the job and was improperly applied under Hummel's supervision. The record is silent as to why the court entered judgment for \$800, especially in view of defendant's admission that it liability stated plaintiff was entitled to the full sum of \$1,031.21. Although plaintiff's counsel argue that defendant has no cause to complain when it is required to respond in damages for a lesser sum than plaintiff is lawfully entitled to recover, the fact that



judgment was entered for the lesser sum lends support to defendant's contention that the court's conclusion was inconsistent with the proofs and with the theory upon which the case was presented, and its counsel suggests that the court evidently realized that the defense interposed was a meritorious one, but concluded that defendant had obtained some benefit from the roofing material furnished by plaintiff and therefore it was entitled to a judgment in the lesser amount, which was arbitrarily determined. In Selamakos v. Victory Ice & Ice Cream Co., 246 Ill. App. 178, the court, under similar circumstances, reversed and remanded a cause for a new trial upon the theory that the judgment was inconsistent with the proofs and that either plaintiff was entitled to a verdict for the full amount of its claim or defendant was entitled to a verdict in its favor, there being no middle ground. In Schwill & Co. v. Moulton, 168 Ill. App. 519, the court likewise set aside the verdict of a jury on the ground that it was inconsistent with any legitimate theory of the evidence and could not be accounted for except as compromise or bias.

With respect to defendant's counterclaim, we find no evidence from which a fair measure of damage could be determined, and therefore we are of opinion that the judgment against defendant on the counterclaim was properly entered.

Since the cause was heard by the court without a jury, and in view of our conclusion that the evidence and law support defendant's theory of defense, no useful purpose would be served by remanding the cause. The judgment of the Municipal court is therefore as to plaintiff's claim, affirmed as to the counterclaim, fore reversed/and judgment entered here in favor of defendant for costs.

JUDGMENT PARTLY REVERSED AND  
PARTLY AFFIRMED AND JUDGMENT  
HERE IN FAVOR OF DEFENDANT.

Seanlan, P. J., and Sullivan, J., concur.

Judgment was entered for the lesser sum I am support to defend-  
 ant's contention that the court's conclusion was inconsistent  
 with the proofs and with the theory upon which the case was  
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 realized that the defense interposed was a veridical one, but  
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 Since the cause was heard by the court without a jury, and  
 in view of our conclusion that the evidence and law support defend-  
 ant's theory of defense, no useful purpose would be served by re-  
 manding the cause. The judgment of the municipal court is there-  
 fore reversed and judgment entered here in favor of defendant for  
 as to plaintiff's claim, affirmed as to the counterclaim.

costs.

JUDGMENT PARTIALLY REVERSED AND  
 PARTIALLY AFFIRMED AND JUDGMENT  
 ENTERED IN FAVOR OF DEFENDANT.

41927

MAX ZIMEL, doing business as  
ZIMEL FRUIT COMPANY,  
Appellee,

v.

SOUTHERN PACIFIC COMPANY,  
a corporation,  
Appellant.

86  
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

314 I.A. 1981 4

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court for the alleged negligent handling by defendant as an initial carrier under the Carmack Amendment to the Hepburn Act, as amended, of a shipment of melons from Heber, California, to Rock Island, Illinois, involving some \$500. Defendant joined issue, denying failure of any duty on its part or any of its railroad connections in handling the shipment in question. The suit came up for hearing October 30, 1939, and was thereafter continued eight times and finally set for hearing January 20, 1941. Counsel failing to appear when the cause was reached for trial on that date, an order was entered dismissing it for want of prosecution. Due notice of the call on which the case appeared had been published in the Daily Municipal Court Record, showing the case as the fourth on the list published and indicating the court room in which the trial was to be held. April 2, 1941, more than thirty days after the date of the dismissal, plaintiff filed his motion to reinstate the cause. Thereafter, April 22, 1941, defendant filed its motion to strike plaintiff's application for reinstatement, which was denied, and an order was entered reinstating the cause, from which defendant appeals on the ground that the Municipal court was without jurisdiction to enter the order after the expiration of the thirty-day period.

Plaintiff presented two affidavits in support of his motion to vacate the dismissal. One of these, the original



41327

COURT OF CHICAGO,  
JULY 11, 1941.

MAX NIMEL, doing business as  
"NIMEL TRADING COMPANY",  
Appellee,  
v.  
SOUTHERN PACIFIC COMPANY,  
a corporation,  
Appellant.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court for the

alleged negligent handling by defendant as an initial carrier

under the Carmack Amendment to the Hepburn Act, as amended,

of a shipment of salmon from Seattle, California, to Stock Island,

Illinois, having the same B.O.B. Defendant joined issue, denying

failure of any duty on its part or any of its railroad connec-

tions in handling the shipment in question. The suit came up

for hearing October 30, 1940, and was thereafter continued

eight times and finally set for hearing January 20, 1941.

Counsel failing to appear when the case was reached for trial

on that date, an order was entered dismissing it for want of

prosecution. Due notice of the call on which the case appeared

had been published in the Daily Municipal Court Record, showing

the case as the fourth on the list published and indicating the

court room in which the trial was to be held. April 2, 1941,

more than thirty days after the date of the dismissal, plaintiff

filed his motion to reinstate the cause. Thereafter, April 22,

1941, defendant filed his motion to strike plaintiff's application

for reinstatement, which was denied, and an order was entered

reinstating the cause, from which defendant appeals on the ground

that the Municipal Court was without jurisdiction to enter the

order after the expiration of the thirty-day period.

Plaintiff presented two affidavits in support of his

motion to vacate the dismissal. One of these, the original

affidavit of Alexander Golbus, alleged that he and Frank Golbus were associated in the practice of law and had been retained to institute suit against defendant; that between September 18, 1938, and February 25, 1941, deponent was seriously ill with coronary sclerosis; that when he returned to his office on the last named date he was permitted to practice his profession for only several hours each day; that before returning to his office, matters entrusted to the firm of Golbus & Golbus were being taken care of by his associate Frank Golbus; that prior to February 25, 1941, Frank Golbus was called for examination by the draft board under the Selective Service Act, placed in classification 1A, and directed to hold himself in readiness for induction into the service; that on or about January 20, 1941, the suit was called for trial and neither affiant nor his associate being present, the cause was dismissed by the court for want of prosecution; that immediately upon affiant's return to his office February 25, 1941, he made a careful check of the firm's files and found that this cause had been dismissed; that notwithstanding the fact that he was able to remain at his office only two or three hours a day, affiant made every effort to draw up the petition and affidavit for the vacation of the dismissal order; that he had exercised due diligence and that in "good conscience and equity" the matter should be reinstated; that he had a good cause of action and unless the dismissal order was vacated, plaintiff would lose his right to institute suit against defendant by reason of the expiration of the limitation clause of the Interstate Commerce Act.

The supplementary affidavit of Alexander Golbus, which was permitted to be filed May 13, 1941, nunc pro tunc as of May 7, 1941, alleged that March 6, 1941, he had telephoned the office of John A. Sheean, attorney for defendant, and was advised by Miss Forner of the latter's office that Sheean was out of town,

affidavit of Alexander Golbus, alleged that he and Frank Golbus were associated in the practice of law and had been retained to institute suit against defendant; that between September 12, 1938, and February 25, 1941, defendant was seriously ill with coronary sclerosis; that when he returned to his office on the last named date he was permitted to practice his profession for only several hours each day; that before returning to his office, letters entrusted to the firm of Golbus & Golbus were being taken care of by his associate Frank Golbus; that prior to February 25, 1941, Frank Golbus was called for examination by the Court heard under the Selective Service Act, placed in classification 1A, and directed to hold himself in readiness for induction into the service; that on or about January 20, 1941, the suit was called for trial and neither affiant nor his associate being present, the cause was dismissed by the court for want of prosecution; that immediately upon affiant's return to his office February 25, 1941, he made a careful check of the firm's files and found that this cause had been dismissed; that notwithstanding the fact that he was able to remain at his office only two or three hours a day, affiant made every effort to draw up the petition and affidavit for the vacation of the dismissal order; that he had expended due diligence and that in "good conscience and verity" the matter should be reinstated; that he had a good cause of action and unless the dismissal order was vacated, plaintiff would lose his right to institute suit against defendant by reason of the expiration of the limitation clause of the Interstate Commerce Act.

The supplementary affidavit of Alexander Golbus, which was permitted to be filed May 13, 1941, under the name of May 7, 1941, alleged that March 6, 1941, he had telephoned the office of John A. Hagan, attorney for defendant, and was advised by Hagan that the latter's office had been out of town,



but was expected back in about a week, and that he desired to talk with deponent at a latter date; that affiant again telephoned Sheean's office on March 17, 1941, and was advised to call at the latter's office; that in pursuance of this conversation affiant came in person to the office of Sheean on March 21, 1941, and discussed with him the matter of stipulating for the reinstatement of the cause; that deponent was advised that it would be necessary to secure the consent of defendant's general counsel, and in the meantime to present in court the necessary motion, petition and affidavit for the vacation of the dismissal; that March 29, 1941, affiant mailed to defendant's attorney the required documents, including notice that he would on April 2, 1941, present his motion to the court.

Sheean's counter-affidavit averred in substance that the suit had originally come up for hearing October 30, 1939, and had on numerous occasions been continued and finally set for hearing on January 20, 1941, after due publication of the call in the Daily Municipal Court Record, which listed this cause as No. 4 on the calendar and indicated that it would be heard in Room 1105 of the City Hall; that the case did in fact come up for hearing in the room indicated on January 20, 1941, and was on that date dismissed for want of prosecution by the court of its own motion; that on April 2, 1941, more than thirty days after the date of the dismissal, plaintiff filed his motion to reinstate the cause, without having taken any steps to set aside the dismissal within the period of thirty days; that on February 7, 1941, prior to the expiration of the thirty-day period, Sheean had written and mailed to Frank Golbus, one of plaintiff's attorneys and the one actively handling the cause during most of the period while it was pending, a letter from which we quote the following: "The Zimel case No. 4083731, vs. S. P. Co., was dismissed on January 20th, 1941. In the event you want to have this rein-

but was expected back in about a week, and that he desired to talk with defendant at a latter date; that affiant again telephoned Green's office on March 17, 1941, and was advised to call at the latter's office; that in pursuance of this conversation affiant came in person to the office of Green on March 21, 1941, and discussed with him the matter of stipulating for the reinstatement of the cause; that defendant was advised that it would be necessary to secure the consent of defendant's general counsel, and in the meantime to present in court the necessary motion, petition and affidavit for the vacation of the dismissal; that March 29, 1941, affiant mailed to defendant's attorney the required documents, including notice that he would on April 2, 1941, present his motion to the court.

Green's counter-affidavit averred in substance that the suit had originally come up for hearing October 30, 1939, and had on numerous occasions been continued and finally set for hearing on January 20, 1941, after the publication of the call in the Daily Municipal Court Record, which listed this cause as No. 4 on the calendar and indicated that it would be heard in Room 1105 of the City Hall; that the case did in fact come up for hearing in the room indicated on January 20, 1941, and was on that date dismissed for want of prosecution by the court of its own motion; that on April 2, 1941, more than thirty days after the date of the dismissal, plaintiff filed his motion to reinstate the cause, without having taken any steps to set aside the dismissal within the period of thirty days; that on February 7, 1941, prior to the expiration of the thirty-day period, Green had written and mailed to Frank Golbus, one of plaintiff's attorneys and the one actively handling the cause during most of the period while it was pending, a letter from which we quote the following: "The time case No. 4083731, vs. S. P. Co., was dismissed on January 20th, 1941. In the event you want to have this rein-

stated, kindly send me a stipulation and I will be glad to sign it, but a reinstatement order must be entered before the expiration of thirty days from the date of dismissal. In view of the foregoing, please get in touch with me as soon as practicable. Yours very truly, (Signed) John A. Sheean."

Defendant's answer averred the identical facts contained in its counter-affidavit and denied that plaintiff and his legal representatives were free from negligence in allowing the cause to be dismissed for want of prosecution, or that there was any such fraud, accident or mistake as would justify the court in setting aside the dismissal.

Under the settled rule of law in this state an order of dismissal cannot properly be vacated on application made more than thirty days after the dismissal date, except on such a showing as would justify a court of equity in doing so. Imbrie v. Bear, 230 Ill. App. 155. The required showing was defined in Wackerle v. Nies, 286 Ill. App. 51, wherein the court quoted from Kretschmar v. Ruprecht, 230 Ill. 492, as follows: "Equity will not relieve against a judgment at law except in cases of fraud, accident or mistake, and then only where the party applying for relief is free from all negligence." Numerous other decisions to the same effect indicate that this rule has been generally followed. Walker v. Shreve, 87 Ill. 474; Kretschmar v. Ruprecht, 230 Ill. 492; Ward v. Durham, 134 Ill. 195. Since there is no charge that fraud was involved in the matter under consideration, plaintiff must rely on the contention that the dismissal resulted from an accident or mistake. Neither of these contingencies is set forth in the original or supplemental affidavit presented. The fatal omission in both affidavits is that the dismissal resulted without negligence on the part of plaintiff or his legal representatives. The affidavits leave no doubt that Alexander Golbus was incapacitated through illness from attending to his legal matters,



stated, kindly send me a stipulation and I will be glad to sign it, but a reinstatement order must be entered before the expiration of thirty days from the date of dismissal. In view of the foregoing, please get in touch with me as soon as practicable.

Yours very truly, (Signed) John A. Shuman.

Defendant's answer averred the identical facts contained in its counter-affidavit and denied that Plaintiff was negligent. Representatives were free from negligence in allowing the cause to be dismissed for want of prosecution, or that there was any such fraud, accident or mistake as would justify the court in setting aside the dismissal.

Under the settled rule of law in this state an order of dismissal cannot properly be vacated on application made more than thirty days after the dismissal date, except on such a showing as would justify a court of equity in doing so. Lehrig v. Bear, 230 Ill. App. 155. The required showing was defined in MacFarlane v. MacFarlane, 286 Ill. App. 71, wherein the court quoted from

Prosser v. Prosser, 230 Ill. App. 492, as follows: "Equity will not relieve against a judgment at law except in cases of fraud, accident or mistake, and then only where the party applying for relief is free from all negligence." Numerous other decisions to the same effect indicate that this rule has been generally

followed. Walker v. Brown, 87 Ill. App. 474; Prosser v. Prosser, 230 Ill. App. 492; Ward v. Ward, 134 Ill. App. 195. Since there is no charge that fraud was involved in the matter under consideration, Plaintiff must rely on the contention that the dismissal resulted from an accident or mistake. Either of these contentions is

set forth in the original or supplemental affidavits presented. The total omission in both affidavits is that the dismissal resulted without negligence on the part of Plaintiff or his legal representatives. The affidavits leave no doubt that Plaintiff's claims were anticipated through illness from attending to his legal matters,

but his associate Frank Golbus was in charge of the litigation, and although it appears that he was called for examination by the draft board, classified for service and directed to hold himself in readiness for induction, it also appears without controversy that he was here for a considerable portion of the thirty days during which application for reinstatement of the dismissal order could have been made, without taking any steps to secure the reinstatement of the cause. It does not appear from either of the affidavits that Frank Golbus was actually ordered to report for service until part of the thirty-day period had elapsed. Moreover, Sheean's letter addressed to Frank Golbus on February 7, 1941, which was well within the thirty-day period, graciously indicated counsel's intention to enter into a stipulation for reinstatement of the cause and invited counsel to "get in touch with me as soon as practicable." Notwithstanding this suggestion, the thirty-day period expired without anything having been done and, under the circumstances, plaintiff cannot fairly contend that he and his legal representatives were diligent. In all the cases that have been called to our attention the exercise of diligence and the want of negligence are prescribed as indispensable to the relief sought.

We hold that plaintiff's affidavits in support of his motion to vacate the dismissal order were insufficient to vest the court with jurisdiction to reinstate the cause, since there was neither fraud, accident nor mistake involved in the situation, and the allegations fail to set forth diligence and the want of negligence on the part of plaintiff and his legal representatives. Therefore, the order of the Municipal court entered May 7, 1941, reinstating the cause is reversed.

ORDER REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

but his association with Frank Goldus was in charge of the litigation, and although it appears that he was called for examination by the trial board, classified for service and directed to hold himself in readiness for induction, it also appears without controversy that he was here for a considerable portion of the thirty days during which application for reinstatement of the dismissal order could have been made, without taking any steps to secure the reinstatement of the case. It does not appear from either of the affidavits that Frank Goldus was actually ordered to report for a review until part of the thirty-day period had elapsed. Moreover, the letter addressed to Frank Goldus on February 7, 1941, which was well within the thirty-day period, expressly indicated counsel's intention to enter into a stipulation for reinstatement of the case and invited counsel to "get in touch with me as soon as practicable." Notwithstanding this suggestion the thirty-day period expired without anything having been done and, under the circumstances, plaintiff cannot fairly contend that he and his legal representatives were diligent. In all the cases that have been called to our attention the exercise of diligence and the want of negligence are prescribed as indispensable to the relief sought.

It is held that plaintiff's affidavits in support of his motion to vacate the dismissal order were insufficient to vest the court with jurisdiction to reinstate the case, since there was neither fraud, accident nor mistake involved in the situation, and the allegations fail to set forth diligence and the want of negligence on the part of plaintiff and his legal representatives. Therefore, the order of the municipal court entered May 7, 1941, reinstating the case is reversed.

ORDER REVERSED.



42097

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

VIRGINIA WARREN,

Plaintiff in Error.

ERROR TO CRIMINAL

COURT, COOK COUNTY.

314 I.A. 198<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Virginia Warren was indicted for having committed an abortion. She was subsequently tried by jury and March 11, 1941, convicted of the crime charged. March 24, 1941 she was admitted to probation for a period of one year, to be extended for an additional year. July 29, 1941 the Chief Probation Officer of Cook county filed a sworn petition (to which was attached a memorandum prepared by the state's attorney) charging Virginia Warren with violation of the criminal statutes of Illinois and asking that a rule be entered requiring her to show cause why the probation should not be terminated. To this petition Virginia Warren filed her verified answer denying that she had violated the criminal statutes of this state subsequently to being placed on probation and questioning the sufficiency of the petition and the memorandum attached thereto. The court overruled probationer's objections to the sufficiency of the petition, terminated the probation and ordered that she be committed to the Illinois State Reformatory for Women at Dwight, Illinois, for a term of from one to ten years. This writ of error to the Criminal court is prosecuted to review and reverse the order thus entered.

The petition filed by the Chief Probation Officer informed the court that probationer, who had been convicted of abortion in the Criminal court March 11, 1941 and released on probation for one year, was arrested and charged with the crime of aborting on one Edna Ray Tenfelde July 15, 1941; that Mrs. Tenfelde and

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

VIRGINIA WARREN, Plaintiff in Error.

ERROR TO CRIMINAL

COURT, COOK COUNTY.

3141A.198

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Virginia Warren was indicted for having committed an

abortion. She was subsequently tried by jury and March 11, 1941, convicted of the crime charged. March 24, 1941 she was admitted to probation for a period of one year, to be extended for an

additional year. July 29, 1941 the Chief Probation Officer of

Cook county filed a sworn petition (to which was attached a memorandum prepared by the state's attorney) charging Virginia Warren with violation of the criminal statutes of Illinois and asking that a rule be entered requiring her to show cause why

the probation should not be terminated. The petition

Virginia Warren filed her verified answer denying that she had violated the criminal statutes of this state subsequently to being placed on probation and questioning the sufficiency of the petition and the memorandum attached thereto. The court overruled probationer's objections to the sufficiency of the petition, terminated the probation and ordered that she be

committed to the Illinois State Reformatory for women at Dwight, Illinois, for a term of from one to ten years. This writ of error to the Criminal court is presented to review and reverse the order thus entered.

The petition filed by the Chief Probation Officer informed the court that probationer, who had been convicted of abortion in the Criminal court March 11, 1941 and released on probation for one year, was arrested and charged with the crime of abortion on one Edna Ray Tenebe July 15, 1941; that Mrs. Tenebe and

Mrs. Helen Warman made statements concerning the commission of a criminal offense by probationer "as is more fully set out in the statement hereto attached and made part hereof." After considerable discussion between the court and counsel as to the sufficiency of the petition, the court entered a rule on probationer to show cause, why probation should not terminate, returnable September 23, 1941. When the hearing was resumed on that date the court was furnished with a memorandum prepared by Samuel Papanek, assistant state's attorney, to Wilbert Crowley, the state's attorney's first assistant, which reads:

"Re: Virginia Warren. On July 15, 1941, I received information that Virginia Warren may be operating as an abortionist. I arranged to have Policewoman Mary Powers and Officers Moran and Suprenant investigate the premises. On arrival they were denied admission by Virginia Warren. Stated they should wait. One of her men boarders was getting dressed. Officer Suprenant watched the rear exit of this flat and saw two women leaving through the back door. The women's names are Mrs. Edna Ray Tenfelde, 25 years old, of 3833 Lake Park Avenue, and Mrs. Helen Warman, of 3970 South Ellis Avenue. Virginia Warren and these women were taken by the police to Town Hall Station and were questioned by Policewoman Mary Powers. Pursuant to a telephone call, I went to the station the same day to interrogate these women. After becoming acquainted with the facts I proceeded to verify same and my investigation disclosed that Virginia Warren had five years previously aborted Mrs. Helen Warman and that on this day she, Mrs. Warman, accompanied Mrs. Tenfelde to Mrs. Warren's home to have Mrs. Warren perform an abortion on Mrs. Tenfelde. They arrived at the premises about 11 A. M. with Mr. Tenfelde. Mr. Tenfelde left them and arranged to call for them when the abortion was completed; that Mrs. Warman and Mrs. Tenfelde went out for lunch and returned



Mrs. Helen Werman made statements concerning the commission of a criminal offense by probationer "as is more fully set out in the statement hereto attached and made part hereof." After considering the discussion between the court and counsel as to the sufficiency of the petition, the court entered a rule on probationer to show cause, why probation should not terminate, returnable September 23, 1941. When the hearing was resumed on that date the court was furnished with a memorandum prepared by Samuel Papano, assistant state's attorney, to Albert Crowley, the state's attorney's first assistant, which reads:

"Re: Virginia Warren. On July 15, 1941, I received information that Virginia Warren may be operating as an abortionist. I arranged to have Policewoman Mary Powers and Officers Moran and Suprenant investigate the premises. On arrival they were denied admission by Virginia Warren. Stated they should wait. One of her men boarders was getting dressed. Officer Suprenant watched the rear exit of this flat and saw two women leaving through the back door. The women's names are Mrs. Edna Ray Tenfelde, 25 years old, of 3833 Lake Park Avenue, and Mrs. Helen Werman, of 3970 South Ellis Avenue. Virginia Warren and these women were taken by the police to Town Hall Station and were questioned by Policewoman Mary Powers. Pursuant to a telephone call, I went to the station the same day to interrogate these women. After becoming acquainted with the facts I proceeded to verify same and my investigation disclosed that Virginia Warren had five years previously aborted Mrs. Helen Werman and that on this day she, Mrs. Werman, accompanied Mrs. Tenfelde to Mrs. Warren's home to have Mrs. Warren perform an abortion on Mrs. Tenfelde. They arrived at the premises about 11 A. M. with Mr. Tenfelde. Mr. Tenfelde left them and arranged to call for them when the abortion was completed; that Mrs. Werman and Mrs. Tenfelde went out for lunch and returned

to the Warren apartment about 1 P. M.

"That Mrs. Warren took Mrs. Tenfelde into the kitchen and in one of the rear rooms, placed her on a table, injected a hypodermic needle into her hip and with the use of some instruments, which were not seen by Mrs. Tenfelde, the abortion was performed. Mrs. Warman remained in the living room in the same apartment, and when Mrs. Warren had completed the abortion, Mrs. Warren took Mrs. Tenfelde to a bed in the rear bedroom where she was resting at the time of the arrival of the police, which was about 4:15 or 4:30 P. M.; that when the police came to the front door, Mrs. Warren instructed both women to leave by the rear door. Mrs. Tenfelde paid \$35 to Mrs. Warren for the abortion. The amount of the fee was arranged by phone on July 14, 1941, when the appointment was made for the following day. This information was supplied to Policewoman Mary Powers by Mrs. Warman and Mrs. Tenfelde, and also to me in the Lieutenant's office at the Town Hall Police Station.

"I interviewed Mrs. Warren in the Desk Sergeant's quarters. I searched and found a billfold containing two ten-dollar bills in her pocketbook. I asked Mrs. Warren where the \$35 was and Mrs. Warren after some hesitation removed some bills from under her corset. This amounted to \$35. The money was turned over to the Desk Sergeant to be held for evidence. Mrs. Warren would make no satisfactory explanation of the presence of these two women in her home. Mrs. Powers arranged for an Asheim-Zondek test to be made on Mrs. Tenfelde at the Mercy Hospital. Mr. and Mrs. Tenfelde and Mrs. Warman left the Police Station and they were fearful that newspaper publicity would be embarrassing if their names were mentioned. They were repeatedly assured by Mrs. Powers and myself that there would be no publicity. Mrs. Tenfelde was in a weak condition at the time I confronted Mrs. Warren with Mrs. Tenfelde, and at that time Mrs. Tenfelde related the occurrences of the

to the Warren apartment about 1 P. M.

"That Mrs. Warren took Mrs. Tenfelde into the kitchen and in one of the rear rooms, placed her on a table, injected a hypodermic needle into her hip and with the use of some instruments, which were not seen by Mrs. Tenfelde, the abortion was performed. Mrs. Warren remained in the living room in the same apartment, and when Mrs. Warren had completed the abortion, Mrs. Warren took Mrs. Tenfelde to a bed in the rear bedroom where she was resting at the time of the arrival of the police, which was about 4:15 or 4:30 P. M.; that when the police came to the front door, Mrs. Warren instructed both women to leave by the rear door. Mrs. Tenfelde paid \$35 to Mrs. Warren for the abortion. The amount of the fee was arranged by phone on July 14, 1941, when the appointment was made for the following day. This information was supplied to Policewoman Mary Powers by Mrs. Warren and Mrs. Tenfelde, and also to me in the Lieutenant's office at the Town Hall Police Station.

"I interviewed Mrs. Warren in the Desk Sergeant's quarters. I searched and found a billfold containing two ten-dollar bills in her pocketbook. I asked Mrs. Warren where the \$35 was and Mrs. Warren after some hesitation removed some bills from under her corset. This amounted to \$35. The money was turned over to the Desk Sergeant to be held for evidence. Mrs. Warren would make no satisfactory explanation of the presence of these two women in her home. Mrs. Powers arranged for an Asheim-Orndorf test to be made on Mrs. Tenfelde at the Mercy Hospital. Mr. and Mrs. Tenfelde and Mrs. Warren left the Police Station and they were fearful that newspaper publicity would be embarrassing if their names were mentioned. They were repeatedly assured by Mrs. Powers and myself that there would be no publicity. Mrs. Tenfelde was in a weak condition at the time I confronted Mrs. Warren with Mrs. Tenfelde, and at that time Mrs. Tenfelde related the occurrences of the



day as above stated. I showed her the \$35 obtained from Mrs. Warren. Mrs. Tenfelde said she could not identify the bills themselves but that she had paid \$35 in bills of the same denomination.

"Mrs. Warren was ordered to be taken to the Detective Bureau lockup, to be sent to the state's attorney's office for further questioning on the morning of July 16th, at which time a written statement was taken from her, a copy of which is attached. A complaint was signed by Officer Foley. Case was booked in Felony Court on July 17, 1941, and continued to July 28, 1941. A minute sheet was prepared and o.k'd and Grand Jury subpoenas were issued for Mr. and Mrs. Tenfelde and Mrs. Warman for Monday July 21, 1941. Prior to presenting the testimony I was informed by Mrs. Powers that something was wrong with the attitude of the witnesses. I questioned Mr. and Mrs. Tenfelde and was informed that they were going to testify that no abortion was performed; that they had not gone to the Warren home for an abortion but for the fitting of a diaphragm for Mrs. Tenfelde. The witnesses were called before the Grand Jury and their testimony under oath was in effect the only conversation with Mrs. Warren was with reference to a diaphragm. There had been no discussion of an abortion and that no abortion had been performed. Mr. and Mrs. Tenfelde both stated that Mrs. Tenfelde had been excited and nervous and that any statements that were made with reference to an abortion were made because of the strain and nervousness at that time. Mr. Tenfelde stated that he had discussed this proceeding with the company attorney, one Carl Aplon, attorney for Drexel Wine & Liquor Company; that he was not instructed, nor was it suggested that by the testimony given before the Grand Jury it would be unnecessary to testify in any further proceedings and that that would conclude the matter. All parties denied having been told by anyone to testify as they had and insisted the truth of the situation was

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denomination.

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that they were there for the purpose of having a diaphragm fitted for Mrs. Tenfelde. Mrs. Warman further denied that she had had an abortion performed on her by Virginia Warren at any time, but did state that about five years ago she was recommended to Dr. Chaikan, who was then living at 4102 Kenmore, in the same flat with Virginia Warren, and that Dr. Chaikan performed an abortion on her. The result of the Asheim-Zondek test was negative, so that if Virginia Warren had performed any work on Mrs. Tenfelde; it was done fraudulently, as Mrs. Tenfelde apparently is not pregnant. Virginia Warren was tried and found guilty by a jury before Judge Rush of having performed an abortion and a finding of guilty was entered by Judge Rush on March 11, 1941. On March 24, 1941, Judge Rush granted an application for probation on behalf of Virginia Warren and placed her on probation for a period of one year. She is now on probation and her Probation Officer is Miss Fugate. Interview with Miss Fugate indicated that she visited the Warren home at 2 P. M. on July 15, 1941 and that she noticed a strong odor of lysol; that she told Virginia Warren that her apartment smelled like a hospital. She was a woman in a nightgown walk from one bedroom into another; that Mrs. Warren said to this woman, 'Is your husband there?' The woman was very surprised and indicated so in appearance and in speech. Mrs. Warren stated that this woman worked nights and slept days; that she was a regular roomer of hers; that the odor of lysol was due to the use of lysol to clean her house, and Mrs. Warren demonstrated how she cleaned with it in the bathroom. While in the bathroom Miss Fugate saw a woman lying in a bed just off the bathroom door. On my visit to the Warren home I found several kits of medical instruments, including speculums, dilators and curets, instruments which would ordinarily be used in the process of curetting. Mrs. Warren insists that these instruments had been left there after Dr. Chaikan's death in September, 1940, and denied that she had used same on Mrs. Ten-



that they were there for the purpose of having a diaphragm fitted for Mrs. Teneleide. Mrs. Teneleide further denied that she had had an abortion performed on her by Virginia Warren at any time, but did state that about five years ago she was recommended to Dr. Chaikhan, who was then living at 4102 Kenmore, in the same flat with Virginia Warren, and that Dr. Chaikhan performed an abortion on her. The result of the Ashelm-Jendek test was negative, so that if Virginia Warren had performed any work on Mrs. Teneleide; it was done transiently, as Mrs. Teneleide apparently is not pregnant. Virginia Warren was tried and found guilty by a jury before Judge Rush of having performed an abortion and a finding of guilty was entered by Judge Rush on March 11, 1941. On March 24, 1941, Judge Rush granted an application for probation on behalf of Virginia Warren and placed her on probation for a period of one year. She is now on probation and her Probation Officer is Miss Fugate. Interview with Miss Fugate indicated that she visited the Warren home at 2 P. M. on July 15, 1941 and that she noticed a strong odor of IysoI; that she told Virginia Warren that her apartment smelled like a hospital. She was a woman in a nightgown walk from one bedroom into another; that Mrs. Warren said to this woman, 'Is your husband there?' The woman was very surprised and indicated so in appearance and in speech. Mrs. Warren stated that this woman worked nights and slept days; that she was a regular roomer of hers; that the odor of IysoI was due to the use of IysoI to clean her house, and Mrs. Warren demonstrated how she cleaned with it in the bathroom. While in the bathroom Miss Fugate saw a woman lying in a bed just off the bathroom door. On my visit to the Warren home I found several kits of medical instruments, including speculums, dilators and curets, instruments which would ordinarily be used in the process of curetting. Mrs. Warren insists that these instruments had been left there after Dr. Chaikhan's death in September, 1940, and denied that she had used same on Mrs. Teneleide.

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September 23 and prior to the hearing probationer's counsel tendered to the court for filing her answer to the petition for a rule to show cause, which is as follows: "Virginia Warren, being duly sworn, admits that she was convicted of abortion on March 11, 1941, and released on probation for one year, to be extended one year upon statutory conditions, and that she was arrested and charged with the crime of aborting Edna Ray Tenfelde on July 15, 1941, as alleged in Paragraph 1 of the first page of the Petition signed by W. D. Meyering. As to the Second Paragraph in said Petition concerning statements made by certain persons that she committed a criminal offense, she knows only what she has been informed by others with reference to the making of said statements and denies that she ever violated any provision of the laws of the State of Illinois subsequent to being placed on probation on March 11, 1941; that there is attached to the petition signed by the Probation Officer a memorandum containing the typewritten signature of Assistant State's Attorney Samuel Papanek, which details certain matters which affiant is advised by her attorney to answer, and for answer thereto states under oath that she did not commit or attempt to commit any abortion upon the person of Edna Ray Tenfelde on July 15, 1941, or on any other date;

"That Mrs. Tenfelde, accompanied by Mrs. Warman, came to her home on July 15, 1941, and inquired for Dr. Chaikan, who lived in affiant's home until his death on September 11, 1940; that she had no conversation regarding an abortion with either of these woman, or any other person except to advise them of Dr. Chaikan's death; that when police officers came to the door of affiant's home, these women became frightened and insisted upon going out

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the back way; that they made some statements in the presence of this affiant which affiant denied at all times; that money found upon affiant's person was her own and was not secured from either of these women; that Mrs. Tenfelde and Mrs. Warman testified before the Grand Jury under oath that this affiant did not perform any abortion on Mrs. Tenfelde and stated that the statements previously made by them were made under duress while excited and nervous and were untrue; that on July 15, 1941, a woman and two men roomed in her home; that the woman roomer worked as a cook in a restaurant at night and slept during the day; that at the time Mrs. Fugate, the Probation Officer, came to her home at 2 o'clock on July 15, affiant was in the process of cleaning the bathroom with a Lysol solution and that the woman roomer aforesaid was asleep in her room just off the bathroom door; that the medical instruments in her home at the time the police were there on July 15, were the property of Dr. Chaikan, deceased, and were kept in her home by his brother, Albert Chaikan, a druggist, who resided with her until August 30, 1941, at which time affiant gave up the apartment occupied by her as her home; that the matters above referred to were submitted to the Grand Jury of Cook County during its regular session and that the Grand Jury failed to return an indictment charging her with a violation of the Criminal Statutes of Illinois; that the facts and things set up in the Probation Officer's Petition did not make a showing that this affiant violated any Criminal Law of Illinois or any ordinance of any municipality of said State; that the facts and things set up in the memorandum not under oath and not signed by the Assistant State's Attorney, also did not set up sufficient facts to constitute a crime or violation of the laws of Illinois. Affiant prays that the petition be dismissed for insufficiency to show the commission of a crime by affiant or the violation of any ordinance and that she be dismissed on the rule to show cause on this <sup>affidavit</sup> ~~affidavit~~ which she herewith tenders to this Court as her

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answer to the petition hereinbefore filed."

Section 787, chap. 38, Ill. Rev. Stats. 1941, imposes as one of the conditions for release on probation "That the probationer shall not, during the term of his probation, violate any criminal law of the State of Illinois, or any ordinance of any municipality of said state." Section 789 of the same statute provides that "At any time during the period of probation, the court may, upon report by a probation officer or other satisfactory proof of the violation by the probationer of any of the conditions of his probation, revoke and terminate the same \*\*\*." (Italics ours.)

No evidence was adduced upon the hearing. Therefore, the sole question presented is whether the report of the probation officer, when taken together with the memorandum of the state's attorney, constitutes satisfactory proof of the violation of the probation, especially in view of the denials made in respondent's answer and her challenge to the sufficiency of the report. The statements alleged to have been made by Mrs. Tenfelde and Mrs. Warman "concerning the commission of a criminal offense by her [probationer]," as alleged in the petition, were subsequently denied by these women, and the grand jury, to whom the matter was presented by the state's attorney during its regular session, failed to return an indictment against respondent. Moreover, the state's attorney's memorandum states that Policewoman Mary Powers, who interrogated Mrs. Tenfelde and Mrs. Warman, arranged for an Asheim-Zondek test at Mercy Hospital to determine the fact of pregnancy, and further states that the test showed a negative result. The inference from this circumstance is that Mrs. Tenfelde was not pregnant and consequently abortion was unnecessary.

The only other information presented to the court is found in the state's attorney's memorandum. The statute prescribes that the court may revoke and terminate probation "upon report by a probation officer



answer to the petition heretofore filed."

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bation officer or other satisfactory proof of the violation by the probationer of any of the conditions of his probation." To sustain the order we should be required to hold that the state's attorney's memorandum complied with the requirement of the statute in furnishing "other satisfactory proof" of the violation by the probationer. A careful examination of the memorandum clearly indicates that the statements made by Papanek were predicated almost entirely on hearsay and information which had been given to him by others. Papanek could not have testified to the statements made by him because they were not within his own knowledge, and therefore his memorandum cannot be considered as satisfactory proof of the matters contained in it. It was within the power of the court to require the probation officer to furnish satisfactory proof before acting upon the petition. The summary revocation of the probation upon hearsay statements, without a hearing, was not a sufficient compliance with the statute.

We hold that neither the report nor the state's attorney memorandum contained the satisfactory proof required by the statute, and therefore the rule on respondent to show cause, should have been discharged. Accordingly, the judgment or order of the Criminal court is reversed.

JUDGMENT OR ORDER REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

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We hold that neither the report nor the state's attorney's memorandum contained the satisfactory proof required by the statute, and therefore the rule on respondent to show cause, should have been discharged. Accordingly, the judgment or order of the Criminal Court is reversed.

JUDGMENT OR ORDER REVERSED.

SCAMIA, P. J., and ELLIOTT, J., concur.



SALVATORE SAVINA, a minor by  
MICHELE SAVINA, his father and  
next friend,

Appellant,

vs.

NATIONAL BRICK COMPANY, a  
corporation, and JOHN P. TRAFF,  
Appellees.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

314 I.A. 199

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment entered upon the verdict of a jury in favor of defendants, National Brick Company and John P. Traff, and against plaintiff, Salvatore Savina, in an action brought by the latter for damage for personal injuries alleged to have been received as the result of the negligent operation of an automobile owned by the National Brick Company and driven by Traff.

Plaintiff's complaint alleged substantially that defendants owned and operated a certain automobile on Sherman avenue at or near South boulevard in the city of Evanston, Illinois, on June 7, 1936; that it was their duty to avoid running into or colliding with persons rightfully upon said highway; that plaintiff was a minor walking along the highway in the exercise of the care and caution that an ordinarily prudent child of his age and intelligence would have used under the same or similar circumstances; and that the defendants were negligent (a) in that they failed to keep a proper lookout, (b) they were guilty of general negligence in the operation of the automobile, (c) they operated the car with defective brakes, (d) they failed to give warning of their approach, and (e) they failed to keep their car under proper control; that by and through their negligence as aforesaid their automobile was so driven that it ran into and collided with plaintiff; that plaintiff was seriously and permanently injured; and that the father and next friend, Michele Savina, assigned his claim to the minor.

... IV ...

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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THE UNIVERSITY OF CHICAGO PRESS

DATE: JAN 1961 CATEGORY: C. 21 OF 10 INT

On the 1st of July, 1917, the following persons were present at the meeting of the Board of Directors of the National Board of Fire Underwriters:

in an action brought by the United States for the

operation of a telephone owned by the National Life Insurance Co. and the results of the following investigation:

... ..

THE UNIVERSITY OF CHICAGO

[illegible]

1. The first of these is the fact that the

June 7, 1936; sent to Mr. J. H. ...

1948-1949

A minor variation in the shape of the base of the

o u l o n l a n d , an official's presence only. I did not investigate.

... I have used up the ...

10-11-1944

I. (b) Any were killed I was in the office.

of the Committee, ( ) they were a

CONFIDENTIAL

Failed to keep their car under proper control; that by the same

their religious beliefs as a guide in their lives.

[illegible]

It is not possible to determine the exact date of the first meeting of the committee, but it is believed that it was held in the latter part of 1941 or the beginning of 1942.

...and the ... ..

Defendant National Brick Company's answer admitted the ownership of the automobile in question but denied its operation thereof as charged in the complaint. It then denied all of the material allegations of the complaint.

Defendant Traff's answer admitted that he operated the automobile as charged in the complaint but denied his ownership thereof. It then denied all of the material allegations of the complaint.

Plaintiff was a few months less than three years old at the time of the occurrence. No defense of contributory negligence on the part of his parents was interposed.

Traff was employed by the National Brick Company and it is undisputed that at the time of the occurrence he was operating the automobile as a servant of said company and within the scope of his employment.

Plaintiff's theory of fact is that his home was on the northeast corner of Sherman street and South boulevard in the city of Evanston, Illinois; that he had been playing on the parkway between the east curb of Sherman street and the sidewalk at a point about opposite the rear entrance to his home, which was about forty feet north of the north curb of South boulevard; that he had stepped off the curb a few feet west on to Sherman street when he was struck by defendants' automobile; that Sherman street is a north and south street; that defendants' automobile was traveling south on Sherman street and that a short time before it struck him, it had passed two other automobiles also traveling south on Sherman street; that when it passed said automobiles, defendants' car was proceeding south on the east side of the street; that at the time of the impact plaintiff was on Sherman street about four feet west of the east curb thereof and defendants' car was traveling at an excessive rate of speed; and that it was a clear day, the street was dry and the defendant Traff, who was driving the automo-



Defendant National Brick Company's answer.

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bile, had an unobstructed view to the south on Sherman street.

No witness testified at the trial to having seen the actual impact or as to what occurred immediately prior thereto.

Defendants' theory of fact is that Traff was driving the automobile south on Sherman street at a speed of from ten to twenty miles an hour; that he was traveling about midway between the center line of ~~the~~ said street and the west curb thereof; that he passed no automobiles going south and that there were no other automobiles going either south or north on Sherman street in that vicinity at the time of the occurrence; that he did not at or prior to the time of the impact drive the automobile east of the center line of Sherman street, which is thirty-four feet wide; that there was an automobile parked at the east curb of Sherman street facing north about ninety-two feet north of the north curb of South boulevard; that as he passed this parked automobile he heard a "thud;" that as he proceeded south he looked into his rear view mirror and saw an "object" on the street; and that he stopped his car just north of South boulevard and walked back to where plaintiff was lying, west of the center line of Sherman street. Traff did not see plaintiff on the east sidewalk or on the parkway between the sidewalk and the east curb or on the street, either prior to or at the time of the impact.

Inasmuch as this cause must be reversed because of the impropriety of certain instructions given to the jury, we refrain from discussing the evidence in detail since in all likelihood the case will be retried.

Plaintiff contends that the trial court erred in giving the following instructions to the jury:

"10. The jury are instructed that there is no presumption of negligence on the part of the defendants from the fact alone that an accident happened, or that the plaintiff received an injury. Before defendants can be held liable in this case you must believe from the evidence that the defendants were guilty of the omission of some duty or the commission of some negligent act that occasioned the injury to the plaintiff.

"11. The court instructs the jury that if they believe from the evidence in this case that the defendants' driver was driv-

... had a witness, viz. ...  
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from the evidence in this case that the defendant, driver, driv-



ing the automobile of the defendants and was exercising ordinary care in the management and operation of the same, and that the plaintiff at the time and place of the injury suddenly and unexpectedly and without the knowledge of the defendant ran into the automobile of the defendants and was thereby injured, then in order to charge the defendants with a duty to avoid injuring the plaintiff the plaintiff must show by a preponderance of the evidence in the case that the circumstances were of such character that the defendant driver had an opportunity to become conscious of the facts giving rise to such duty and a reasonable opportunity in the exercise of care and caution to perform such duty.

"12. The court instructs the jury that if they believe from the evidence under the instructions of the court that the plaintiff was suddenly and without any negligence or fault on the part of the defendants placed in a position of danger, then in order to charge the defendants with the duty to avoid injuring the plaintiff, the plaintiff must prove by a preponderance of the evidence that the circumstances were such that the driver of the defendants' car had time and opportunity to become conscious by the exercise of ordinary care of the facts giving rise to such duty, and a reasonable opportunity to perform it.

"And if the jury further believe from the evidence under the instructions of the court that the circumstances as shown by the evidence did not charge the said defendants with a duty thus defined, or if the jury believe from the evidence under the instructions of the court that the driver of defendants' automobile did not have a reasonable opportunity to perform ~~bb~~ the exercise of that degree of care elsewhere required in these instructions such duty as thus defined, then they should find the defendants not guilty.

cxXXXXXX

"14. You are instructed that if you find from the evidence and under the instructions of the court that the injury to the plaintiff was caused by an accident and without negligence of the defendants, then you are instructed that the plaintiff cannot recover.

As to Instruction No. 10, it is sufficient to state that an almost identical instruction was condemned in Smith v. Illinois Power Company, 279 Ill. App. 509. In that case at defendant's request the trial court gave the following instruction: "The court instructs the jury that there is no presumption of negligence arising against the defendant from the simple fact of itself that the plaintiff was injured as a result of the occurrences in question." There the court said at p. 520: "This instruction is an abstract statement of a proposition of law and it was not applicable to the facts in the case. It was irrelevant and

ing the automobile of the defendants and was exercising ordinary care in the management and operation of the same, and that the plaintiff at the time and place of the injury suddenly and unexpectedly and without the knowledge of the defendant ran into the automobile of the defendants and was thereby injured, then in order to charge the defendants with a duty to avoid injuring the plaintiff the plaintiff must show by a preponderance of the evidence in the case that the circumstances were of such character that the defendant driver had an opportunity to become conscious of the facts giving rise to such duty and a reasonable opportunity in the exercise of care and caution to perform such duty.

"12. The court instructs the jury that if they believe from the evidence under the instructions of the court that the plaintiff was suddenly and without any negligence or fault on the part of the defendants placed in a position of danger, then in order to charge the defendants with the duty to avoid injuring the plaintiff, the plaintiff must prove by a preponderance of the evidence that the circumstances were such that the driver of the defendants' car had time and opportunity to become conscious by the exercise of ordinary care of the facts giving rise to such duty, and a reasonable opportunity to perform it.

"And if the jury further believe from the evidence under the instructions of the court that the circumstances as shown by the evidence did not charge the said defendants with a duty thus defined, or if the jury believe from the evidence under the instructions of the court that the driver of defendants' automobile did not have a reasonable opportunity to perform by the exercise of that degree of care elsewhere required in these instructions such duty as thus defined, then they should find the defendants not guilty.

\*\*\*\*\*

"14. You are instructed that if you find from the evidence and under the instructions of the court that the injury to the plaintiff was caused by an accident and without negligence of the defendants, then you are instructed that the plaintiff cannot recover.

As to instruction No. 10, it is sufficient to state that an almost identical instruction was condemned in Smith v. Illinois Power Company, 27 Ill. App. 509. In that case at defendant's request the trial court gave the following instruction: "The court instructs the jury that there is no presumption of negligence arising against the defendant from the simple fact of itself that the plaintiff was injured as a result of the occurrences in question." There the court said at p. 520: "This instruction is an abstract statement of a proposition of law and it was not applicable to the facts in the case. It was irrelevant and



misleading." Instruction No. 10 is not applicable to the facts in this case and should not have been given.

The giving of Instruction No. 11 at defendants' request constituted reversible error. It suggested to the jury that plaintiff "suddenly and unexpectedly \* \* \* ran into the automobile" when there was not a particle of evidence in the record to that effect. Even the defendant Traff, who drove the automobile, did not testify to any fact or circumstance from which it could be fairly inferred that plaintiff "suddenly and unexpectedly \* \* \* ran into the automobile." Traff stated definitely that he did not see plaintiff at all, either prior to or at the time of the impact. According to Traff, although he had a clear and unobstructed view to the south as he approached the point of the occurrence from the north, he did not know where plaintiff came from or how he came into contact with the automobile. There was no evidence which tended, even slightly, to show that plaintiff ran into the automobile and it was highly improper to instruct the jury concerning a fact not in evidence. That plaintiff ran into the automobile was first suggested by this instruction and not from any fact or circumstance in evidence in this case. In Mississippi Lime & Material Co. v. Smith, 282 Ill. App. 361, the court said at p. 369: "Instructions which suggest matters not suggested by the evidence have been universally condemned by our Supreme Court." In Mayer v. Springer, 192 Ill. 270, the court stated at p. 275: "It is the duty of the court to give to the jury, in its instructions, rules of law which are applicable to the evidence in the case, and to make the application so that the jury may understand the relation of the rules to the evidence." Instruction No. 11 is erroneous for the further reason that it states the rule or law applicable to a situation where the driver of an automobile is confronted with a sudden and unexpected emergency and where, after discovering the



misleading. " Instruction No. 10 is not applicable to the facts in this case and should not have been given. The giving of Instruction No. 11 as defendant's request constituted reversible error. It suggested to the jury that plaintiff "suddenly and unexpectedly" \* \* \* ran into the automobile "when there was not a particle of evidence in the record to that effect. Even the record at Traff, who drove the automobile, did not testify to any fact or circumstance from which it could be fairly inferred that plaintiff "suddenly and unexpectedly" \* \* \* ran into the automobile. " Traff stated definitely that he did not see plaintiff at all, either prior to or at the time of the impact. According to Traff, although he had a clear and unobstructed view to the south as he approached the point of the occurrence from the north, he did not know where plaintiff came from or how he came into contact with the automobile. There was no evidence which tended, even slightly, to show that plaintiff ran into the automobile and it was highly improper to instruct the jury concerning a fact not in evidence. That plaintiff ran into the automobile was first suggested by this instruction and not from any fact or circumstance in evidence in this case. In Mississippi Life & Material Co. v. Smith, 282 Ill. App. 381, the court said at p. 389: "Instructions which suggest matters not suggested by the evidence have been universally condemned by our Supreme Court." In Hayes v. Springer, 194 Ill. 470, the court stated at p. 475: "It is the duty of the court to give to the jury, in its instructions, rules of law which are applicable to the evidence in the case, and to make the application so that the jury may understand the relation of the rules to the evidence." Instruction No. 11 is erroneous for the further reason that it states the rule of law applicable to a situation where the driver of an automobile is confronted with a sudden and unexpected emergency and where, after discovering the

danger, he has neither the time nor the opportunity to avoid the injury. Here there are no facts or circumstances in evidence to which said rule may be applied. Traff certainly could not have been confronted with any emergency as to plaintiff, as according to his own evidence, he did not see the boy until after the impact.

Instruction No. 12 likewise had to do with the existence of a sudden emergency and this instruction also constituted reversible error for the reasons stated in our discussion of Instruction No. 11.

Instruction No. 14 should not have been given to the jury. There is no fact or circumstance in evidence in this case that would warrant the jury in finding that "the injury to plaintiff was caused by an accident." Under plaintiff's theory of fact, his injury could not have been caused by an accident and neither could it have been so caused under defendants' theory of fact. It is stated in defendant's brief that "so far as the evidence shows the plaintiff suddenly and unexpectedly ran from behind a standing automobile and into the rear of defendants' car" and that "he was not seen by the defendant in the street though he was looking." This theory must have been evolved from the imagination of defendants' counsel since there is no evidence in the record to support it. If defendants' car came into contact with the boy about four feet west of the center line of Sherman street, where Traff stated the impact took place, to reach that point plaintiff would have had to travel a distance of more than twenty-one feet from the east curb of Sherman street or fifteen or sixteen feet from the west side of the parked automobile if the boy emerged from behind said parked car. In either event he would have been in plain view of the driver of the automobile as the latter approached from the north, while the boy traveled either of the distances indicated. In passing upon a similar instruction

danger, he has neither the time nor the opportunity to avoid the injury. Here there are no facts or circumstances in evidence to which said rule may be applied. Traffic certainly could not have been confronted with any emergency as to plaintiff, as according to his own evidence, he did not see the boy until after the impact.

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Instruction No. 14 should not have been given to the jury. There is no fact or circumstance in evidence in this case that would warrant the jury in finding that "the injury to plaintiff was caused by an accident." Under plaintiff's theory of fact, his injury could not have been caused by an accident and neither could it have been as caused under defendant's theory of fact. It is stated in defendant's brief that "so far as the evidence shows the plaintiff suddenly and unexpectedly ran from behind a standing automobile and into the rear of defendant's car" and that "he was not seen by the defendant in the street though he was looking." This theory must have been evolved from the imagination of defendant's counsel since there is no evidence in the record to support it. If defendant's car came into contact with the boy about four feet west of the center line of Sherman street, where Traffic stated the impact took place, to reach that point plaintiff would have had to travel a distance of more than twenty-one feet from the east curb of Sherman street or fifteen or sixteen feet from the west side of the parked automobile if the boy emerged from behind said parked car. In either event he would have been in plain view of the driver of the automobile as the latter approached from the north, while the boy traveled either of the distances indicated. In passing upon a similar instruction



in Mississippi Lime & Material Co. v. Smith, *supra*, the court said at pp. 368, 369:

"No negligence is shown in the conduct of the appellant. Negligence is shown in the conduct of appellees. The result which followed was the proximate result of appellee's negligence. How may we then account for this verdict? In such cases it is particularly essential that a jury be properly and carefully instructed. There is a theory upon which this jury might have acted, and that theory evolves from the charge of the court. There is a suggestion that an accident brought about Douglas' death. That suggestion does not come from any evidence or circumstance in this case. It comes for the first time when the court by its charge injected into the case the theory that the death of Douglas might have come about through an accident, and if it did, there could be no recovery. It is true that this part of the charge is given in most personal injury cases, and in most injury cases the charge is proper, but in this case we can see nothing in this record, - certainly not of fact, and not of circumstances, - which could have suggested to the jury that the death of Douglas might have come about through an accident. It was wrong in our judgment for the court to make that suggestion for the first time. Instructions which suggest matter not suggested by the evidence have been universally condemned by our Supreme Court. Chicago & A. Ry. Co. v. Adler, 129 Ill. 335; Indianapolis & St. L. Ry. Co. v. Miller, 71 Ill. 463; Streeter v. Humrichouse, 357 Ill. 234."

It is the well settled rule that where, as here, there is a sharp conflict in the evidence it is particularly essential that the jury be carefully and properly instructed.

For the reasons stated herein the judgment of the Superior court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Friend, J., concur.

In MacLachlan v. MacLachlan, 100 Cal. 2d 100, 328 P.2d 100, the court said

at pp. 328, 329:

"No negligence is shown in the conduct of the appellant. Negligence is shown in the conduct of appellee. The result which followed was the proximate result of appellee's negligence. How may we then account for this verdict? In such cases it is particularly essential that a jury be properly and carefully instructed. There is a theory upon which this jury might have acted, and that theory involves from the charge of the court. There is a suggestion that an accident proximately caused Douglas' death. That suggestion does not come from any evidence or circumstance in this case. It comes from the first time when the court by its charge injected into the case the theory that the death of Douglas might have come about through an accident, and if it did, there could be no recovery. It is true that this part of the charge is given in most personal injury cases, and in most injury cases the charge is proper, but in this case we can see nothing in this record, - certainly not of fact, and not of circumstances, - which could have suggested to the jury that the death of Douglas might have come about through an accident. It was wrong in our judgment for the court to make that suggestion for the first time. Instructions which suggest matter not suggested by the evidence have been universally condemned by our Supreme Court. Chicago & A. Ry. Co. v. Adler, 129 Ill. 325; Indiana Bell & Tel. Co. v. Miller, 71 Ill. 483; Steeper v. Humphreys, 327 Ill. 234."

It is the well settled rule that where, as here, there is a sharp conflict in the evidence it is particularly essential that the jury be carefully and properly instructed.

For the reasons stated herein the judgment of the superior court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

SEANIAN, P. J., and FRIEND, J., concur.

41510

ALVIN F. EITELGEORGE, for use  
of JAMES W. JULIAN,  
Appellee,

v.

GENERAL FINANCE CORPORATION,  
a corporation,  
Appellant.

29  
} APPEAL FROM SUPERIOR  
} COURT, COOK COUNTY.

314 I.A. 199<sup>2</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the garnishee defendant, General Finance Corporation, from a judgment for \$743.84 entered against it in favor of the beneficial plaintiff, James W. Julian. Originally there were two garnishee defendants but the Motor Car Loan Company of Illinois was discharged. A series of eighteen demands in garnishment were filed April 19, 1940, and an affidavit for garnishment was filed at the same time, pursuant to which summons in garnishment was issued against and served upon General Finance Corporation on said date. On April 22, 1940, an answer of "No Funds" was filed by the garnishee and a replication to said answer was filed by plaintiff April 23, 1940. The cause was tried on the following stipulation of facts:

"1. That on the 19th day of April, 1940, a garnishment suit was filed by the plaintiff, James W. Julian, against General Finance Corporation and Motor Car Loan Company of Illinois, a corporation, and on the 19th day of April, A. D. 1940, service of said garnishees was had by summons. Answer of garnishee was filed on the 22nd day of April, 1940,

"2. That the following demand in garnishment was served upon General Finance Corporation and Motor Car Loan Company of Illinois, a corporation,

"Demand in garnishment dated 1/26/40 served at 1:10 P.M. upon Maurice Daniels.

"Demand in garnishment dated 1/31/40 served at 12:50 P.M. upon Maurice Daniels.

"Demand in garnishment dated 2/5/40 served at 11:22 P.M. upon William V. Brooks.



41320

ALVIN F. FINCH, JR., for as  
of JAMES W. JULIAN, appellee,

APPEAL FROM SUPERIOR

COURT, COOK COUNTY,

GEN. FINCH FINCH CORPORATION,  
a corporation,  
Appellant.

3141.A.199

THE JUDICIAL BRANCH OF THE COURT.

This is an appeal by the garnishee defendant, General

Finance Corporation, from a judgment for \$743.84 entered

against it in favor of the beneficial plaintiff, James W.

Julian. Originally there were two garnishee defendants

but the Motor Car Loan Company of Illinois was discharged,

a series of eighteen demands in garnishment were filed April

19, 1940, and an affidavit for garnishment was filed at the

same time, pursuant to which summons in garnishment was issued

against and served upon General Finance Corporation on said

date. On April 22, 1940, in answer to "No Funds" was filed

by the garnishee and a replication to said answer was filed

by plaintiff April 28, 1940. The case was tried on the

following stipulation of facts:

"1. That on the 19th day of April, 1940, a garnishment  
suit was filed by the plaintiff, James W. Julian, against  
General Finance Corporation and Motor Car Loan Company of  
Illinois, a corporation, and on the 19th day of April, A. D.  
1940, service of said garnishment was had by summons. Answer  
of garnishee was filed on the 22nd day of April, 1940.

"2. That the following demand in garnishment was served  
upon General Finance Corporation and Motor Car Loan Company  
of Illinois, a corporation,

"Demand in garnishment dated 1/26/40 served at 1:10 P.M.  
upon Maurice Daniels.

"Demand in garnishment dated 1/31/40 served at 12:30 P.M.  
upon Maurice Daniels.

"Demand in garnishment dated 2/5/40 served at 11:22 P.M.  
upon William V. Brooks.

"Demand in garnishment dated 2/10/40 served at 10:40 P.M. upon Maurice Daniels.

"Demand in garnishment dated 2/14/40 served at 4:40 P.M. upon William V. Brooks.

"Demand in garnishment dated 2/19/40 served at 2:50 P.M. upon Maurice Daniels.

"Demand in garnishment dated 2/24/40 served at 11:25 A.M. upon Violet Barton.

"Demand in garnishment dated 2/29/40 served at 10:50 A. M. upon Violet Barton.

"Demand in garnishment dated 3/5/40 served at 10:20 A.M. upon Violet Barton.

"Demand in garnishment dated 3/9/40 served at 11:23 A.M. upon Dorothy Eldine.

"Demand in garnishment dated 3/14/40 served at 10:19 A.M. upon Violet Barton.

"Demand in garnishment dated 3/18/40 served at 1:00 P.M. upon Violet Barton.

"Demand in garnishment dated 3/23/40 served at 12:40 P.M. upon Violet Barton.

"Demand in garnishment dated 3/28/40 served at 12:15 P.M. upon Sharon Kraumhauer.

"Demand in garnishment dated 4/2/40 served at 11:20 A.M. upon Violet Barton.

"Demand in garnishment dated 4/6/40 served at 12:35 P.M. upon Violet Barton.

"Demand in garnishment dated 4/11/40 served at 11:55 A.M. upon William V. Brooks.

"Demand in garnishment dated 4/16/40 served at 11:10 A.M. upon Violet Barton.

"That the said defendant, Alvin F. Eitelgeorge, was employed on January 1, 1940, and is and was employed at the time of answer by Garnishee by the General Finance Corporation and resides in the State of Ohio.

"3. That no service of demand in garnishment was made upon the defendant, Alvin F. Eitelgeorge, employee of the General Finance Corporation.

4. That on the 1st day of February, A. D. 1940, the General Finance Corporation as employer of said Alvin F. Eitelgeorge, paid him the sum of \$177.45 in advance for February salary; that on the 1st day of February, A. D. 1940, a check in the sum of \$49.50 was issued to said Alvin F. Eitelgeorge in advance for February salary; that on the 17th day of February, 1940, the sum of \$11.63 was paid by the

- "Demand in garnishment dated 2/13/40 served at 10:40 P.M. upon Maurice Daniels.
- "Demand in garnishment dated 2/14/40 served at 4:40 P.M. upon William V. Brooks.
- "Demand in garnishment dated 2/19/40 served at 2:50 P.M. upon Maurice Daniels.
- "Demand in garnishment dated 2/24/40 served at 11:25 A.M. upon Violet Barton.
- "Demand in garnishment dated 2/29/40 served at 10:50 A.M. upon Violet Barton.
- "Demand in garnishment dated 3/2/40 served at 10:20 A.M. upon Violet Barton.
- "Demand in garnishment dated 3/9/40 served at 11:23 A.M. upon Dorothy Laine.
- "Demand in garnishment dated 3/14/40 served at 10:19 A.M. upon Violet Barton.
- "Demand in garnishment dated 3/18/40 served at 1:00 P.M. upon Violet Barton.
- "Demand in garnishment dated 3/23/40 served at 12:40 P.M. upon Violet Barton.
- "Demand in garnishment dated 3/28/40 served at 12:15 P.M. upon Marion Krausman.
- "Demand in garnishment dated 4/2/40 served at 11:20 A.M. upon Violet Barton.
- "Demand in garnishment dated 4/5/40 served at 12:35 P.M. upon Violet Barton.
- "Demand in garnishment dated 4/11/40 served at 11:55 A.M. upon William V. Brooks.
- "Demand in garnishment dated 4/15/40 served at 11:10 A.M. upon Violet Barton.
- "That the said defendant, Alvin F. Mitelgeorge, was employed on January 1, 1940, and is and was employed at the time of answer by garnishee by the General Finance Corporation and resides in the State of Ohio.
- "3. That no service of demand in garnishment was made upon the defendant, Alvin F. Mitelgeorge, employee of the General Finance Corporation.
4. That on the 1st day of February, A.D. 1940, the General Finance Corporation as employer of said Alvin F. Mitelgeorge, paid him the sum of \$177.45 in advance for February salary; that on the 1st day of February, A.D. 1940, a check in the sum of \$49.50 was issued to said Alvin F. Mitelgeorge in advance for February salary; that on the 15th day of February, 1940, the sum of \$11.83 was paid by the



General Finance Corporation to Alvin F. Eitelgeorge for January bonus; that on the 13th day of March, A. D. 1940, the sum of \$22.96 was paid by the General Finance Corporation to Alvin F. Eitelgeorge, as February bonus; that on the 23rd day of February, 1940, the sum of \$229.55 was paid by the General Finance Corporation to Alvin F. Eitelgeorge in advance for March salary; that on the 1st day of April, 1940, the sum of \$252.75 was paid by the General Finance Corporation to Alvin F. Eitelgeorge in advance for April salary.

"5. That the defendant, Alvin F. Eitelgeorge, has not filed with the garnishees, or either of them, an affidavit claiming statutory exemptions, nor has either of the garnishees, General Finance Corporation or Motor Car Loan Company of Illinois, a corporation, claimed statutory exemptions for Alvin F. Eitelgeorge."

After a hearing on the stipulated facts judgment for \$743.84 was entered against the garnishee defendant, General Finance Corporation, as heretofore shown.

This action was brought under section 14 of the Garnishment Act (ch. 62, Ill. Rev. Stat. 1939), the pertinent portions of which are as follows:

"\*\*\* Before bringing suit a demand in writing shall be served upon the employer and upon the employee for the excess above the amount herein exempted. Such service shall be had upon the employer, either by delivering a copy of such demand to the employer, or by leaving a copy thereof at the usual place of business of such employer with his or its superintendent, manager, cashier, general agent or clerk. And such service shall be had upon the employee either by delivering a copy of such demand to such employee, or by leaving a copy thereof at his usual place of abode with some person of his family of the age of ten years or upwards, and informing such persons of the contents thereof. Such copies for the employer and employee shall have endorsed thereon the time of service upon them, which shall be at least twenty-four hours previous to bringing suit. Such notice shall be filed with the Justice or clerk of the court, with the manner and time of the service of the same endorsed thereon, and the return duly sworn to before some officer authorized to administer oaths, before it shall be lawful to issue a summons in such case, or to require an employer to answer in any garnishee proceedings. Any judgment rendered without said demand being served upon the employee, and so proven and filed as aforesaid, shall be void. The excess of wages or salary or commission or profit allowances shall be held by the employer, subject to garnishment by the creditor serving demand, for five (5) days after such service of demand."

While many grounds are urged for the reversal of the judgment it is necessary to determine only whether plaintiff's method of serving the wage demands upon the employer was in conformity with the provisions of the foregoing statute.

It will be noted that the statute provides that "the excess

General Finance Corporation to Alvin F. Mitchell for January bonus; that on the 13th day of March, 1940, the sum of \$22.50 was paid by the General Finance Corporation to Alvin F. Mitchell as a bonus; that on the 22nd day of February, 1940, the sum of \$22.50 was paid by the General Finance Corporation to Alvin F. Mitchell in advance for March salary; that on the 1st day of April, 1940, the sum of \$22.50 was paid by the General Finance Corporation to Alvin F. Mitchell in advance for April salary.

"5. That the defendant, Alvin F. Mitchell, has not filed with the garnishee, or either of them, an affidavit claiming statutory exemptions, nor has either of the garnishees, General Finance Corporation or Motor Car Loan Company of Illinois, a corporation, claimed statutory exemptions for Alvin F. Mitchell."

After a hearing on the stipulated facts judgment for \$743.04 was entered against the garnishee defendant, General Finance Corporation, as heretofore shown.

This action was brought under section 14 of the Garnishment Act (Ch. 62, Ill. Rev. Stat. 1939), the pertinent portions of which are as follows:

"\*\*\* Before bringing suit a demand in writing shall be served upon the employer and upon the employee for the excess above the amount herein exempted. Such service shall be had upon the employer, either by delivering a copy of such demand to the employer, or by leaving a copy thereof at the usual place of business of such employer with his or its superintendent, manager, cashier, general agent or clerk, and such service shall be had upon the employee either by delivering a copy of such demand to such employee, or by leaving a copy thereof at his usual place of abode with some person of his family or of the family of two years or upwards, and informing such persons of the contents thereof. Two copies for the employer and employee shall have endorsed thereon the time of service upon them, which shall be at least twenty-four hours previous to bringing suit. Such notice shall be filed with the Justice or clerk of the court, with the return and time of the service of the same endorsed thereon, and the return duly sworn to before some officer authorized to administer oaths, before it shall be lawful to issue a summons in such case, or to require an employer to answer in any garnishment proceedings. Any judgment rendered without said demand being served upon the employee, and so proven and filed as aforesaid, shall be void. The excess of wages or salary or commission or profit allowances shall be held by the employer, subject to garnishment by the creditor serving demand, for five (5) days after such service of demand."

While many grounds are urged for the reversal of the judgment it is necessary to determine only whether plaintiff's method of serving the wage demands upon the employer was in conformity with the provisions of the foregoing statute. It will be noted that the statute provides that "the excess



of wages or salary or commission or profit allowances shall be held by the employer, subject to garnishment by the creditor serving demand" only "for five (5) days after such service of demand." It will be further noted that what plaintiff sought to do herein was to circumvent this provision of the statute by serving a new wage demand upon the employer on or before the fifth day after the previous wage demand had been served upon it and thus prevent such employer from paying to the employee any money which might have accrued to the latter's benefit from the date of the original wage demand until five days after the date of the final wage demand. In other words plaintiff sought to compel the employer to hold subject to garnishment any money that might accrue to the employee from January 26, 1940, when the first wage demand was served on the employer, until April 21, 1940, which was five days after the final wage demand of April 16, 1940. If plaintiff's method of serving wage demands were permissible the employee's salary or other money accruals due him as specified in the statute might be tied up indefinitely by superimposing wage demand upon wage demand until plaintiff made up his mind to procure his garnishment writ. No such procedure was contemplated by the legislature when it enacted section 14 of the Garnishment Act. The language in that section that "the excess of wages or salary or commission or profit allowances shall be held by the employer, subject to garnishment by the creditor serving demand, for five \*\*\* days after such service of demand" is plain and unambiguous and therefore not open to construction. It expressly states that an employer properly served with a demand in garnishment shall only be bound to hold subject to garnishment funds in his hands due and owing to his employee for five days after the service of such demand. Thus the creditor is precluded under the statute from superimposing successive wage demands, one upon the other, as a basis for the issuance of a garnishment writ.



of wages on salary or commission or profit allowance shall be held by the employer, subject to garnishment by the creditor serving demand" only "for five (5) days after such service of demand." It will be further noted that what plaintiff sought to do herein was to circumvent this provision of the statute by serving a new wage demand upon the employer on or before the fifth day after the previous wage demand had been served upon it and thus prevent such employer from paying to the employee any money which might have accrued to the latter's benefit from the date of the original wage demand until five days after the date of the final wage demand. In other words plaintiff sought to compel the employer to hold subject to garnishment any money that might accrue to the employee from January 26, 1940, when the first wage demand was served on the employer, until April 21, 1940, which was five days after the final wage demand of April 16, 1940. If plaintiff's method of serving wage demands were permissible the employee's salary or other money accrues due him as specified in the statute might be tied up indefinitely by superimposing wage demand upon wage demand until plaintiff made up his mind to procure his garnishment writ. No such procedure was contemplated by the legislature when it enacted section 14 of the Garnishment Act. The language in that section that "the excess of wages or salary or commission or profit allowance shall be held by the employer, subject to garnishment by the creditor serving demand, for five (5) days after such service of demand" is plain and unambiguous and therefore not open to construction. It expressly states that an employer properly served with a demand in garnishment shall only be bound to hold subject to garnishment funds in his hands due and owing to his employee for five days after the service of such demand. Thus the creditor is precluded under the statute from superimposing successive wage demands, one upon the other, as a means for the issuance of a garnishment writ.

such as were made here  
The statute makes no provision for a succession of wage demands/  
as the basis for the issuance of a summons in garnishment but  
does provide merely for a single wage demand as one of the  
prerequisites for the institution of a garnishment proceeding.  
The wage demand specified in the statute is without force and  
absolutely ineffective for any purpose after the expiration of  
five days from the date of its service and plaintiff's chain  
system of serving wage demands could not avail him to keep any  
single demand alive for more than five days because the statute  
authorized no such procedure. It is not surprising that plaintiff  
was unable to find any authority which construed the provision  
of section 14 under consideration. The reason for his inability  
in this regard is undoubtedly due to the fact that said provision  
of the statute is so clear that it never before occurred to anyone  
to question it or to evolve any such unique method of service of  
wage demands as plaintiff resorted to in this case. Therefore  
if plaintiff was otherwise entitled to a garnishment writ against  
defendant garnishee, its issuance could have been based only upon  
the last wage demand made upon it on April 16, 1940, and it clearly  
appears from the stipulated facts that defendant garnishee was not  
indebted to its employee Alvin F. Eitelgeorge for salary, wages,  
commission or profit allowances April 16, 1940, when the last  
demand was made, April 19, 1940, when the garnishment writ issued,  
or on April 22, 1940, when the garnishee filed its answer.

For the reasons stated herein the judgment of the Superior  
court is reversed and judgment is entered here in favor of the  
garnishee defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT  
HERE IN FAVOR OF GARNISHEE  
DEFENDANT AND AGAINST PLAINTIFF.

Scanlan, P. J., and Friend, J., concur.

such as were made here

The statute makes no provision for a cessation of wage demands

as the basis for the issuance of a summons in garnishment but

does provide merely for a single wage demand as one of the

prerequisites for the institution of a garnishment proceeding.

The wage demand specified in the statute is without force and

absolutely ineffective for any purpose after the expiration of

five days from the date of its service and plaintiff's claim

system of serving wage demands could not avail him to keep any

single demand alive for more than five days because the statute

authorized no such procedure. It is not surprising that plaintiff

was unable to find any authority which construed the provision

of section 14 under consideration. The reason for his inability

in this regard is undoubtedly due to the fact that said provision

of the statute is so clear that it never before occurred to anyone

to question it or to evolve any such unique method of service of

wage demands as plaintiff resorted to in this case. Therefore

it plaintiff was otherwise entitled to a garnishment writ against

defendant garnishee, its issuance could have been based only upon

the last wage demand made upon it on April 16, 1940, and it clearly

appears from the stipulated facts that defendant garnishee was not

indebted to its employee Alvin F. Fitzgerald for salary, wages,

commission or profit allowances April 16, 1940, when the last

demand was made, April 19, 1940, when the garnishment writ issued,

or on April 22, 1940, when the garnishee filed its answer.

For the reasons stated herein the judgment of the superior

court is reversed and judgment is entered here in favor of the

garnishee defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT

ENTERED IN FAVOR OF GARNISHEE

DEBENTURE AND AGAINST PLAINTIFF.

Condon, P. J., and Friend, J., concur.



41970

HELEN S. ASHER,  
Appellant,

v.

LUCIUS TETER, JOHN R. FUGARD  
and EDWARD L. VOLLERS, indi-  
vidually and as trustees under  
Stock Trust Agreement, dated  
as of October 15, 1936, with  
5332 BLACKSTONE, Inc., an  
Illinois corporation, and  
LAKE SHORE TRUST & SAVINGS  
BANK, a corporation,  
Appellees.

90  
APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 200

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Helen S. Asher, the owner of stock trust certificates for 10 shares out of 1,087 shares of the capital stock of 5332 Blackstone, Inc., filed her complaint on May 12, 1941 for an injunction to restrain the defendants, Lucius Teter, John R. Fugard and Edward L. Vollers, individually and as trustees under a certain stock trust agreement, 5332 Blackstone, Inc., and the Lake Shore Trust & Savings Bank, the depository and agent of said stock trustees, from selling the apartment building owned by the defendant corporation. The complaint also prayed for other relief as will hereinafter appear. Plaintiff's motion for a temporary injunction to restrain the consummation of the sale was denied May 13, 1941. On defendants' motion an order was entered June 13, 1941, dismissing plaintiff's complaint for want of equity. Immediately thereafter, on the same day, plaintiff's motion for leave to file an amended complaint was denied. Plaintiff appeals from the orders dismissing her complaint and denying her leave to file an amended complaint.

Plaintiff's complaint is as follows:

"1. That she is the holder and owner of stock trust certificates for ten shares of capital stock of 5332 Blackstone, Inc., an Illinois corporation, which certificates have been duly issued by Lake Shore Trust & Savings Bank, a corporation of

HELEN S. ASHER,  
Appellant,

v.

INCUS TESTER, JOHN R. FUGARD  
and EDWARD L. VOLTERS, Inds.,  
individually and as trustees under  
Stock Trust Agreement dated  
as of October 12, 1936, with  
5332 BLACKSTONE, Inc., an  
Illinois corporation, and  
LAKE SHORE TRUST & SAVINGS  
BANK, a corporation,  
Appellees.

COOK COUNTY.

APPEAL FROM CIRCUIT COURT.

314 I.A. 300

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Helen S. Asher, the owner of stock trust certificates for 10 shares out of 1,087 shares of the capital stock of 5332 Blackstone, Inc., filed her complaint on May 12, 1941 for an injunction to restrain the defendants, Incus Tester, John R. Fugard and Edward L. Volters, individually and as trustees under a certain stock trust agreement, 5332 Blackstone, Inc., and the Lake Shore Trust & Savings Bank, the depository and agent of said stock trustees, from selling the apartment building owned by the defendant corporation. The complaint also prayed for other relief as will hereinafter appear. Plaintiff's motion for a temporary injunction to restrain the continuation of the sale was denied May 13, 1941. On defendants' motion an order was entered June 13, 1941, dismissing plaintiff's complaint for want of equity. Immediately thereafter, on the same day, plaintiff's motion for leave to file an amended complaint was denied. Plaintiff appeals from the orders dismissing her complaint and denying her leave to file an amended complaint.

Plaintiff's complaint is as follows:

"1. That she is the holder and owner of stock trust certificates for ten shares of capital stock of 5332 Blackstone, Inc., an Illinois corporation, which certificates have been duly issued by Lake Shore Trust & Savings Bank, a corporation of



Chicago, as depository and agent of the stock trustees under Stock Trust Agreement dated as of October 15, 1936, by and between 5332 Blackstone, Inc., a corporation, and Dayton Keith, Arthur F. Mohl, C. S. Tuttle, and their successors and substitutes as stock trustees and the holders of stock trust certificates.

"2. Plaintiff files this complaint on her own behalf and on behalf of all other holders of trust certificates for capital shares of 5332 Blackstone, Inc., a corporation, for the purpose of enjoining and restraining the sale of the property and assets of 5332 Blackstone, Inc., a corporation, under notice issued by the defendants stock trustees under date of April 21, 1941, and for the further purpose of seeking an accounting from the defendants and among other things that if the property should be sold, it may be sold to the highest and best bidder available without limitation, restriction or stifling of competition in order that the best possible price may be obtained for the benefit of plaintiff and of all other trust certificate holders.

"3. That Lucius Teter, John R. Fugard and Edward L. Vollers, claiming to act as successor trustees under said trust agreement, are in control of all of the shares of the capital stock of 5332 Blackstone, Inc., a corporation, and of the election and appointment of the directors and officers thereof.

"4. That the said stock trustees are in a fiduciary capacity for and on behalf of plaintiff and of all other holders of stock trust certificates issued pursuant to said stock trust agreement.

"5. That under date of April 21, 1941, the said Lucius Teter, John R. Fugard and Edward L. Vollers, stock trustees, issued a notice of offer to purchase property, wherein they advised plaintiff and the holders of trust certificates of capital stock of 5332 Blackstone, Inc., a corporation, that the corporation had received an offer to buy the land, building and personal property owned by it and located at 5332 Blackstone Avenue, consisting of land frontage of fifty feet on Blackstone Avenue with a depth of one hundred fifty feet and improved with a three-story basement brick and stone building of the corridor type containing nine three-room apartments, three two and one-half-room apartments, sixteen two-room apartments and fifteen one and one-half-room apartments; and that the building is approximately fifteen years old and is furnished with average furnishings. They stated further that a contract had been entered into between the proposed purchaser, Benjamin Melmed, one of the present lessees of the property, and that said contract had been entered into between the said purchaser and the trustees of 5332 Blackstone, Inc., a corporation.

"6. Said notice stated that the contract provides for the payment in cash of the sum of Fifty-seven Thousand Dollars (\$57,000) as the full purchase price, but that the company is to pay brokerage commission of Twenty-seven Hundred Ten Dollars (\$2710) if the sale is completed.

"7. Said notice stated further:

"As your trustees we have given careful thought to the question of the advisability of selling the property. We have



Chicago, as depository and agent of the stock trustees under Stock Trust Agreement dated as of October 15, 1938, by and between J332 Blackstone, Inc., a corporation, and Dayton Keltie, Arthur F. Mohl, C. S. Tuttle, and their successors and assigns as stock trustees and the holders of stock trust certificates.

"2. Plaintiff files this complaint on her own behalf and on behalf of all other holders of trust certificates for capital shares of J332 Blackstone, Inc., a corporation, for the purpose of enforcing and restraining the sale of the property and assets of J332 Blackstone, Inc., a corporation, under notice issued by the defendants stock trustees under date of April 21, 1941, and for the further purpose of seeking an accounting from the defendants and among other things that if the property should be sold, it may be sold to the highest and best bidder available without limitation, restriction or stalling of competition in order that the best possible price may be obtained for the benefit of plaintiff and of all other trust certificate holders.

"3. That Lucius Teter, John R. Fugard and Edward L. Vellera, claiming to act as successor trustees under said trust agreement, are in control of all of the shares of the capital stock of J332 Blackstone, Inc., a corporation, and of the election and appointment of the directors and officers thereof.

"4. That the said stock trustees are in a fiduciary capacity for and on behalf of plaintiff and of all other holders of stock trust certificates issued pursuant to said stock trust agreement.

"5. That under date of April 21, 1941, the said Lucius Teter, John R. Fugard and Edward L. Vellera, stock trustees, issued a notice of offer to purchase property wherein they advised plaintiff and the holders of trust certificates of capital stock of J332 Blackstone, Inc., a corporation, that the corporation had received an offer to buy the land, building and personal property owned by it and located at J332 Blackstone Avenue, consisting of land frontage of fifty feet on Blackstone Avenue with a depth of one hundred fifty feet and improved with a three-story basement brick and stone building of the corridor type containing nine three-room apartments, three two and one-half-room apartments, sixteen two-room apartments and fifteen one and one-half-room apartments; and that the building is approximately fifteen years old and is furnished with average furnishings. They stated further that a contract had been entered into between the proposed purchaser, Benjamin Melmed, one of the present lessees of the property, and that said contract had been entered into between the said purchaser and the trustees of J332 Blackstone, Inc., a corporation.

"6. Said notice stated that the contract provided for the payment in cash of the sum of fifty-seven thousand dollars (\$57,000) as the full purchase price, but that the company is to pay brokerage commission of twenty-seven hundred ten dollars (\$2,710) if the sale is completed.

"7. Said notice stated further:

"As your trustees we have given careful thought to the question of the advisability of selling the property. We have

determined to recommend the proposal to you for acceptance because it is our belief that this offer is a fair and reasonable offer at the present time. Naturally, we are in no position to foretell whether or not a higher price could be obtained in future years.

"The Stock Trust Agreement under which your shares are held provides that the trustees may not cause the sale of the property if certificate holders owning 33-1/3% of the shares of the corporation object in writing. Accordingly, this is to notify you that if less than 33-1/3% of the shares object to the proposed sale in writing prior to May 12, 1941, the sale will be approved and we will authorize it to be consummated in your behalf. If 33-1/3% or more of the shares object to the proposed sale in writing prior to May 12, 1941, we will not cause the sale to be completed. If an offer of more than \$57,000 is received from another prospective purchaser prior to May 12, 1941, your company has the right to accept the highest offer unless the original offeror agrees to meet the higher proposal. Therefore, approval of the terms of the proposed sale shall be considered approval of offers at a higher figure."

"That said notice further states that the corporation obtained an appraisal by William A. Lieghly, a professional appraiser, and that his report states that in his opinion the fair market value of the property (land, building and equipment) as of March 6, 1941, is Sixty Thousand Dollars (\$60,000); that in said appraisal the furnishings in the building as depreciated are valued at approximately Eight Thousand Dollars (\$8,000); that said notice further states that the County Assessor has determined in connection with the 1939 real estate taxes that the full value of the land and building is Fifty-nine Thousand Seven Hundred Dollars (\$59,700); that, of course, this valuation is exclusive of the value of the furnishings and personal property in the building which belong to the corporation and which were valued by Mr. Leighly at about Eight Thousand Dollars (\$8,000).

"5. That the proposed purchaser is one of the lessees of the property who had been leasing the premises including the furnishings at a monthly rental of Six Hundred Dollars (\$600) under lease which expired on April 30, 1940; that prior thereto, the stock trustees negotiated a three-year extension of the term with an increase in rental to Six Hundred Seventy-five Dollars (\$675) per month; that said lease further provides that the lessee shall pay thirty-three and one-third per cent (33-1/3%) of the gross income per month over Nineteen Hundred Dollars (\$1900); that the said lessee has been reporting a gross income of approximately \$1750 per month; that the said lease is cancellable in the event of sale of the property by the corporation.

"6. That the stock trustees did not notify the shareholders that the said lease was thus cancellable in the event of sale; that in the annual report of the 5332 Blackstone, Inc., a corporation, for the year ending September 30, 1940, issued under date of December 18, 1940, by the stock trustees, it appears that the first mortgage reorganization loan at interest of five per cent (5%) per annum required semi-annual payments of \$625 on May 1st and November 1st of each year, and a final payment of \$19,375 on November 1, 1941, that in said annual report the stock trustees further notified the holders of trust certificates that the 1939 real estate tax bill amounted to \$2,862.28 or an increase of \$829.52 over the 1938 bill; that the stock trustees caused proper objections to be filed, and as a result obtained a reduction of \$848.96; that the



determined to recommend the proposal to you for acceptance because it is our belief that this offer is a fair and reasonable offer at the present time. Naturally, we are in no position to forecast whether or not a higher price could be obtained in future years.

"The Stock Trust Agreement under which your shares are held provides that the trustees may not cause the sale of the property if certificate holders owning 33-1/3% of the shares of the corporation object in writing. Accordingly, this is to notify you that if less than 33-1/3% of the shares object to the proposed sale in writing prior to May 12, 1941, the sale will be approved and we will authorize it to be consummated in your behalf. If 33-1/3% or more of the shares object to the proposed sale in writing prior to May 12, 1941, we will not cause the sale to be completed. If an offer of more than \$27,000 is received from another prospective purchaser prior to May 12, 1941, your company has the right to accept the highest offer unless the original offeror agrees to meet the higher proposal. Therefore, approval of the terms of the proposed sale shall be considered approval of the terms of the proposed sale at a higher figure."

"That said notice further states that the corporation obtained an appraisal by William A. L. Gilby, a professional appraiser, and that his report states that in his opinion the fair market value of the property (land, building and equipment) as of March 6, 1941, is sixty thousand dollars (\$60,000); that he said appraised the furnishings in the building as depreciated and valued at approximately \$17,000; that the County Assessor has determined said notice further states that the full value in connection with the 1939 real estate taxes that the full value of the land and building is fifty-nine thousand seven hundred dollars (\$59,700); that, of course, this valuation is exclusive of the value of the furnishings and personal property in the building which belong to the corporation and which were valued by Mr. Gilby at about \$17,000."

"5. That the proposed purchaser is one of the lessees of the property who had been leasing the premises including the furnishings at a monthly rental of six hundred dollars (\$600) under lease which expired on April 30, 1940; that prior thereto, the stock trustees negotiated a three-year extension of the term with an increase in rental to six hundred seventy-five dollars (\$675) per month; that said lease further provides that the lessee shall pay thirty-three and one-third per cent (33-1/3%) of the gross income per month over nineteen hundred dollars (\$1900); that the said lessee has been reporting a gross income of approximately \$1750 per month; that the said lease is cancellable in the event of sale of the property by the corporation."

"6. That the stock trustees did not notify the shareholders that the said lease was thus cancellable in the event of sale; that in the annual report of the 1932 Blackstone, Inc., a corporation, for the year ending September 30, 1940, issued under date of December 18, 1940, by the stock trustees, it appears that the first mortgage reorganization loan at interest of five per cent (5%) per annum required semi-annual payments of \$625 on May 1st and November 1st of each year, and a final payment of \$1,375 on November 1, 1941, that in said annual report the stock trustees further notified the holders of trust certificates that the 1939 real estate tax bill amounted to \$2,862.28 or an increase of \$29.72 over the 1938 bill; that the stock trustees caused proper objections to be filed, and as a result obtained a reduction of \$348.96; that the



1939 assessed valuation of \$59,700 is the figure obtained after securing said deduction from the original assessed valuation of approximately \$84,000 as originally determined by the County Assessor.

"7. That in the notice of offer to purchase the property dated April 21, 1941, the stock trustees estimated the payments to be made out of the proceeds of sale and include therein, among others, the following items:

|                                                                                      |             |
|--------------------------------------------------------------------------------------|-------------|
| First Mortgage Loan .....                                                            | \$20,000.00 |
| Cost of retiring first mortgage loan....                                             | 750.00      |
| Brokerage commission to Morris B. DeWoskin & Co.....                                 | 2,710.00    |
| Fees of stock trustees for services in connection with the sale and dissolution..... | 525.00      |
| Fees of attorneys in connection with the sale and dissolution.....                   | 600.00      |
| Sundry expenses.....                                                                 | 200.00      |

"8. That said notice of April 21, 1941, further contained the statement by the stock trustees that the net earnings of the property before charging depreciation or financing and administrative expenses amount at present to approximately \$5,650 per year on the basis of the present net lease whereunder only the minimum rental has been paid by the lessee, the proposed purchaser; that under said net lease the lessee is required to maintain the furnishings and equipment in the building in good condition.

"9. That the said 5332 Blackstone, Inc., a corporation, has paid liquidating dividends of One Dollar per share per year for the years of 1937, 1938 and 1939, and in 1940 paid a liquidating dividend of One Dollar and Twenty-five Cents per share; that on September 30, 1940, the annual report showed cash on hand of \$4867.33, and that as of April 1, 1941, cash on hand was \$5,237.99. There are Ten Hundred Eighty-seven (1087) shares issued and outstanding.

"10. Plaintiff represents that neither the stock trustees nor the corporation solicited or secured any other offers for the purchase of the building and the furnishings involved; that the granting of the contract to the present lessee with a condition that said lessee should have the right to meet any higher proposal, definitely stifles competition and prevents any interested prospective purchaser from bidding or attempting to purchase the property involved; that in considering the valuation of the property and of the furnishings and of its earnings, and further considering the improving renting conditions in the City of Chicago and in the neighborhood of the building in particular, and further considering the general improved market in regard to real estate in the City of Chicago, the price offer of \$57,000 is insufficient and inadequate.

"11. That it was the duty of the stock trustees to solicit offers for the purchase of this property publicly and to canvass the many operators of hotels and apartment buildings in order to attempt to secure the highest and best possible offer for the purchase of the property.

"12. That the stock trustees were derelict in their

1939 assessed valuation of \$29,700 is the figure obtained after assessing said deduction from the original assessed valuation of approximately \$34,000 as originally determined by the County Assessor.

"7. That in the notice of offer to purchase the property dated April 21, 1941, the stock trustees estimated the payments to be made out of the proceeds of sale and include therein, among others, the following items:

|                                                                                       |             |
|---------------------------------------------------------------------------------------|-------------|
| First Mortgage Loan .....                                                             | \$20,000.00 |
| Cost of retiring first mortgage loan .....                                            | 750.00      |
| Brokerage commission to Morris B. Deoskin & Co. ....                                  | 2,710.00    |
| Fees of stock trustees for services in connection with the sale and dissolution ..... | 225.00      |
| Fees of attorneys in connection with the sale and dissolution .....                   | 600.00      |
| General expenses .....                                                                | 200.00      |

"8. That said notice of April 21, 1941, further contained the statement by the stock trustees that the net earnings of the property before charging a provision for financing and administrative expenses amount at present to approximately \$7,650 per year on the basis of the present net lease whereunder only the minimum rental has been paid by the lessee, the proposed purchase; that said net lease the lessee is required to maintain the furnishings and equipment in the building in good condition.

"9. That the said 7332 Blackstone, Inc., a corporation, has paid liquidating dividends of One Dollar per share per year for the years of 1937, 1938 and 1939, and in 1940 paid a liquidating dividend of One Dollar and Twenty-five Cents per share; that on September 30, 1940, the annual report showed cash on hand of \$4867.33, and that as of April 1, 1941, cash on hand was \$5,237.99. There are Ten Hundred Eighty-seven (1087) shares issued and outstanding.

"10. Plaintiff represents that neither the stock trustees nor the corporation solicited or secured any other offers for the purchase of the building and the furnishings involved; that the granting of the contract to the present lessee with a condition that said lessee should have the right to meet any higher proposal, definitely stifles competition and prevents any interested prospective purchaser from bidding or attempting to purchase the property involved; that in considering the valuation of the property and of the furnishings and of its earnings, and further considering the improving renting conditions in the City of Chicago and in the neighborhood of the building in particular, and further considering the general improved market in real estate in the City of Chicago, the price offer of \$27,000 is insufficient and inadequate.

"11. That it was the duty of the stock trustees to solicit offers for the purchase of this property publicly and to canvass the many operators of hotels and apartment buildings in order to attempt to secure the highest and best possible offer for the purchase of the property.

"12. That the stock trustees were derelict in their



granting a contract to the present lessee with a stipulation that he would have the privilege and option to meet any higher proposal and thus to limit bidding; that it was the duty of the stock trustees to encourage bidding and to stimulate competitive offers; that in the annual report issued December 18, 1940, the stock trustees requested the certificate holders to vote in favor of the continuance of the stock trust, and stated that many of the certificate holders live away from Chicago, and, therefore, the stock trustees could best serve their interest in the handling of the property and in the continuous functioning of the corporation; that the list of holders of trust certificates is not known or available to any individual trust certificate holder, and that, therefore, concerted or united action by said trust certificate holders is prevented.

"13. That under the circumstances plaintiff brings this suit for and on behalf of herself and of all other holders of stock certificates for capital stock of 5332 Blackstone, Inc., a corporation, under the said stock Trust Agreement dated as of October 15, 1936.

"14. That among other things plaintiff represents that even if the present proposed purchase and sale should be consummated, the stock trustees are not properly authorized or empowered to permit a reduction from the proceeds of sale of the alleged brokerage commission or of the cost of retiring the first mortgage loan or arbitrarily to set the fees as estimated by them; that the relationship between the stock trustees of the corporation and the lessee was sufficiently close at all times so that no broker was necessary or required and that no brokerage commission is properly payable; that the original first mortgage loan would not have matured until November 1, 1941, and that the certificate holders should not be penalized in an amount of Seven Hundred Fifty Dollars (\$750) or in any substantial amount for the cost of retiring said loan or any refinancing thereof; that under the circumstances, the failure of the stock trustees to solicit the best possible price for the sale of the premises and for the best interests of the certificate holders should prevent them from receiving any fees for their services in connection with the sale and dissolution.

"15. The plaintiff is convinced that if the property were offered for sale to the highest and best bidder without any restrictions as attached in the notice of sale dated April 21, 1941, that a much higher price could be realized for the certificate holders than the claimed net price (after the deduction of the alleged brokerage commission).

"16. Because the certificate holders are widely scattered and many of them reside outside the City of Chicago and are unfamiliar with conditions in the City, and because of the inability of said certificate holders to act as a unit and to communicate with each other, and because of the onesided nature of the contract entered into between the stock trustees, the corporation and the proposed purchaser, and because of the failure of the stock trustees to disclose all of the available information to the trust certificate holders, and because of the stock trustees' failure to directly inform the certificate holders that they had failed to publicly advertise or solicit bids and offers for the purchase of the property, it is impossible to obtain objections from thirty-three and one-third per cent (33-1/3%) of the trust certificate holders and to prevent the consummation of the said sale except by the filing of this complaint and by the intervention of a court of equity under the circumstances.



granting a contract to the present lease with a stipulation that it could have the privilege and option to set any other proposal and thus to limit bidding; that it was the duty of the stock trustees to encourage bidding and to stimulate competitive offers; that in the annual report issued December 18, 1940, the stock trustees requested the certificate holders to vote in favor of the continuance of the stock trust, and stated that many of the certificate holders live away from Chicago, and, therefore, the stock trustees could best serve their interests in the handling of the property and in the conditions surrounding the corporation; that the list of holders of trust certificates is not known or available to any individual trust certificate holder, and that, therefore, concerted or united action by said trust certificate holders is prevented.

"13. That under the circumstances plaintiff brings this suit for and on behalf of herself and of all other holders of stock certificates for capital stock of 5332 Blackstone, Inc., a corporation, under the said stock Trust Agreement dated as of October 15, 1935.

"14. That among other things plaintiff represents that even if the present proposed purchase and sale should be consummated, the stock trustees are not properly authorized or empowered to permit a reduction from the proceeds of sale of the alleged brokerage commission or of the cost of retaining the first mortgage loan or arbitrarily to set the fees as evidenced by them; that the relationship between the stock trustees of the corporation and the lessee was sufficiently close at all times so that no broker was necessary or required and that no brokerage commission is properly payable; that the original first mortgage loan would not have matured until November 1, 1941, and that the certificate holders should not be penalized in an amount of seven hundred fifty dollars (\$750) or in any substantial amount for the cost of retaining said loan or any refinancing thereof; that under the circumstances, the failure of the stock trustees to solicit the best possible price for the sale of the premises and for the best interests of the certificate holders should prevent them from receiving any fees for their services in connection with the sale and disposition.

"15. The plaintiff is convinced that if the property were offered for sale to the right and best bidder without any restrictions as attached in the notice of sale dated April 21, 1941, that a much higher price could be realized for the certificate holders than the claimed net price (after the deduction of the alleged brokerage commission).

"16. Because the certificate holders are widely scattered and many of them reside outside the City of Chicago and are unfamiliar with conditions in the city, and because of the inability of said certificate holders to get as a unit and to communicate with each other, and because of the chaotic nature of the contract entered into between the stock trustees, the corporation and the proposed purchaser, and because of the failure of the stock trustees to disclose all of the available information to the trust certificate holders, and because of the stock trustees' failure to properly inform the certificate holders that they had failed to publicly advertise or solicit bids and offers for the purchase of the property, it is impossible to obtain options from thirty-three and one-third per cent (33-1/3%) of the trust certificate holders and to prevent the consummation of the said sale except by the filing of this complaint and by the intervention of a court of equity under the circumstances.

"17. That plaintiff and the other widely scattered trust certificate holders, who do not know each other and cannot communicate with each other, have no adequate remedy at law.

"Wherefore, plaintiff prays as follows:

"(1) That the defendants and each of them be restrained and enjoined from proceeding with the sale of the property, land, building and personal property owned by the 5332 Blackstone Inc., a corporation, and from accepting the alleged contract with Benjamin Melmed for the purchase of the property in the sum of Fifty-seven Thousand Dollars (\$57,000) less brokerage commission;

"(2) That the defendants account for all their acts and doings in the circumstances and for any disbursements made or to be made in connection with said offer of purchase.

"(3) That the said defendants, stock trustees, be removed as stock trustees and officers and directors of the said 5332 Blackstone, Inc., a corporation, and that the court appoint new stock trustees to act under said Stock Trust Agreement dated as of October 15, 1936, and appoint any new officers and directors of said 5332 Blackstone, Inc., a corporation, or, in the alternative, that the court order an election by the holders of trust certificates to select new stock trustees and officers and directors.

"(4) That the court assume jurisdiction and direct the public solicitation of offers to purchase the property of 5332 Blackstone, Inc., a corporation, and that the highest and best bidder may acquire the property and that competition be encouraged instead of being stifled and limited.

"(5) That the defendant Lake Shore Trust and Savings Bank, a corporation, may be restrained and enjoined from notifying the proposed purchaser of the result of the voting of the trust certificate holders or from in any manner assisting in the consummation of the alleged contract with said proposed purchaser.

"(6) That the court investigate the acts and doings of the stock trustees and the other defendants, and compel them to bring into court for audit, examination and investigation all of their books, documents and records of every kind, nature and description in any way bearing upon or relating to the situation described in the complaint as well as for any other purposes pertinent to the present proceeding, and including among the documents, the stock trust agreement, the alleged contract of purchase, notices sent to the trust certificate holders, audits and statements of the lessees, the net lease of the premises, and the audits and statements of the corporation.

"(7) That the court may restrain and enjoin the defendants and their agents, employees and attorneys from proceeding with or from consummating the offer of purchase mentioned in the notice dated April 21, 1941, and from taking any other action in connection with the property of 5332 Blackstone, Inc., a corporation, until the further order of court.

"(8) And that the court may grant such other and further relief in the premises as the court may deem proper and as equity may require for the aid and assistance of the plaintiff, and of all other holders of trust certificates of capital shares of stock of 5332 Blackstone, Inc., a corporation."



"17. That plaintiff and the other widely scattered trust certificate holders, who do not know each other and cannot communicate with each other, have no adequate remedy at law.

Wherefore, plaintiff prays as follows:

"(1) That the defendants and each of them be restrained and enjoined from proceeding with the sale of the property, land, building and personal property owned by the 7332 Blackstone, Inc., a corporation, and from accepting the all and consent with Benjamin Maimon for the purchase of the property in the sum of Fifty-seven Thousand Dollars (\$57,000) less broker's commission;

"(2) That the defendants account for all their acts and doings in the circumstances and for any disbursements made or to be made in connection with said offer of purchase.

"(3) That the said defendants, stock trustees, be removed as stock trustees and officers and directors of the said 7332 Blackstone, Inc., a corporation, and that the court appoint new stock trustees to act under said stock Trust Agreement dated as of October 15, 1936, and appoint any new officers and directors of said 7332 Blackstone, Inc., a corporation, or, in the alternative, that the court order an election by the holders of trust certificate to select new stock trustees and officers and directors.

"(4) That the court assume jurisdiction and direct the public solicitation of offers to purchase the property of 7332 Blackstone, Inc., a corporation, and that the highest and best bidder may acquire the property and that competition be encouraged instead of being stifled and limited.

"(5) That the defendant Lake Shore Trust and Savings Bank, a corporation, may be restrained and enjoined from notifying the proposed purchaser of the result of the voting of the trust certificate holders or from in any manner assisting in the consummation of the alleged contract with said proposed purchaser.

"(6) That the court investigate the acts and doings of the stock trustees and the other defendants, and compel them to bring into court for audit, examination and investigation all of their books, documents and records of every kind, nature and description in any way bearing upon or relating to the situation described in the complaint as well as for any other purpose pertinent to the present proceeding, and including among the documents, the stock first agreement, the alleged contract of purchase, notices sent to the trust certificate holders, audits and statements of the lessees, the net lease of the premises, and the audits and statements of the corporation.

"(7) That the court may restrain and enjoin the defendants and their agents, employees and attorneys from proceeding with or from consummating the offer of purchase mentioned in the notice dated April 21, 1941, and from taking any other action in connection with the property of 7332 Blackstone, Inc., a corporation, until the further order of court.

"(8) And that the court may grant such other and further relief in the premises as the court may deem proper and as equity may require for the aid and assistance of the plaintiff, and of all other holders of trust certificates of capital shares of stock of 7332 Blackstone, Inc., a corporation."



The principal grounds urged in support of defendants' motion to dismiss the complaint were as follows:

"1. The primary relief prayed for in the complaint is that the court enjoin the defendants from consummating the proposed sale of the property of 5332 Blackstone, Inc., a corporation. All other relief prayed for in the complaint is premised upon the issuance of such injunction.

"2. The plaintiff heretofore presented to the court a motion for interlocutory injunction, based on her complaint, and upon hearing of said motion the court denied the motion.

"3. To permit the pendency of plaintiff's complaint debars consummation of the proposed sale of the property of 5332 Blackstone, Inc., and in practical effect operates as an injunction against consummation of sale, to the great injury of the certificate holders of the corporation."

Plaintiff's theory, as stated in her brief, is that "the complaint stated a good cause of action and that the Court should have granted the motion for an interlocutory injunction. Nevertheless, the denial of said motion did not affect the merits of plaintiff's complaint and was in effect only a statement by the Court that the injunction was not necessary to preserve the status quo. Furthermore, the complaint set forth a good cause of action for an accounting by the defendants of all of their acts and doings, and in particular of any disbursements made by them or to be made by them in connection with the proposed sale and in refinancing of the property. The Trustees are not entitled to pay any commission to any alleged brokers for a proposed sale to their tenant. The complaint stated a good cause of action for the reason that the Trustees were attempting to sell the property without soliciting any other offers and without advertising and were attempting to stifle competition instead of fulfilling their duties as fiduciaries to obtain the best price possible for the

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All other relief prayed for in the complaint is premised upon the

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"2. The plaintiff heretofore presented to the court a

motion for interlocutory injunction, based on her complaint, and

upon hearing of said motion the court denied the motion.

"3. To permit the pendency of plaintiff's complaint to deprive

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reason that the Trustees were attempting to sell the property

without soliciting any other offers and without advertising and

were attempting to stifle competition instead of fulfilling their

duties as fiduciaries to obtain the best price possible for the

trust property.

"It is the plaintiff's theory that the defendant's motion to dismiss was not well founded in point of law. However, even if it should have been, the Court was in duty bound to grant plaintiff leave to amend the complaint, and the action of the Court in denying leave to amend was arbitrary and capricious."

Defendants state their position as follows: "Upon denial of an injunction restraining the sale, there remained nothing of plaintiff's complaint except the allegations of paragraph 14, viz.: that the stock trustees had no authority to pay out of the proceeds of the sale (a) brokerage commission, (b) cost of retiring first mortgage loan, (c) trustees' fees, (d) attorney's fees. No facts are alleged in plaintiff's complaint tending to show that said contemplated expenditures were unauthorized or improper; either that the Melmed offer was not actually procured by a broker, entitled to commission; or that under the terms of the loan agreement the first mortgage loan could have been retired without charge; or that the trustees' fees and attorneys' fees were not authorized by the stock trust agreement, or that said fees were unreasonable in amount."

It will be noted that except for the allegations contained in par. 14 of plaintiff's complaint the purpose of such complaint is to secure injunctive relief against the sale of the corporate property and other relief incidental thereto. Paragraph 14 assumes to state equitable grounds for an accounting, but it is readily apparent that the allegations contained therein are insufficient and furnish no proper basis for an accounting. As to the brokerage commission of \$2,710 payable to Morris B. DeWoskin & Co., referred to therein, the complaint states no facts showing that such commission was not actually earned by the broker, that the sale could be consummated without legal liability on the part of the



trust property.

"It is the plaintiff's theory that the defendant's motion to dismiss was not well founded in point of law. However, even if it should have been, the Court was in duty bound to grant plaintiff leave to amend the complaint, and the action of the Court in denying leave to amend was arbitrary and capricious."

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It will be noted that except for the allegations contained in par. 14 of plaintiff's complaint the purpose of such complaint is to secure injunctive relief against the sale of the corporate property and other relief incident thereto. Paragraph 14 assumes to state admissible grounds for an accounting, but it is readily apparent that the allegations contained therein are insufficient and furnish no proper basis for an accounting. As to the brokerage commission of \$2,710 payable to Morris B. DeWoskin & Co., referred to therein, the complaint states no facts showing that such commission was not actually earned by the broker, that the sale could be consummated without legal liability on the part of the

defendant 5532 Blackstone, Inc., to pay the broker's commission or that the defendant trustees had dishonestly and fraudulently subjected said corporation to such legal liability. Neither are there any facts alleged in the complaint tending to show that the stock trustees needlessly or improperly foisted upon the corporation the payment of a real estate brokerage commission; or that the stock trustees obtained or could have obtained an offer of \$57,000 for the property from Melmed or from anyone else without the intervention of the real estate broker. In the period from April 21, 1941, when the conditional contract between the stock trustees and Melmed was announced, until June 13, 1941, when plaintiff's complaint was dismissed, she brought forth no offer of any kind, with or without commission, to compare with the Melmed offer. As to the item of \$750 for "cost of retiring first mortgage loan," no facts are alleged to show that the sale could be consummated without incurring such cost or that the defendant trustees proposed and intended to improperly or fraudulently impose such costs upon the defendant corporation. As to the fees of the trustees and their attorneys in the amounts, respectively, of \$525 and \$600 for their services in connection with the sale of the property and the dissolution of the corporation, also referred to in par. 14, it does not appear from the complaint that upon the consummation of the sale such fees would constitute an improper charge or that they were unreasonable in amount.

The balance of the complaint, as already stated, is concerned with the restraint of the sale of the property by the trustees in accordance with the terms of the contract of sale entered into between them and Melmed, which contract, from aught that appears in the record, was approved by all of the certificate holders except plaintiff. The only other relief sought was

defendant 5532 Blackstone, Inc., to pay the broker's commission or that the defendant trustees had dishonestly and fraudulently subjected said corporation to such legal liability. Neither are there any facts alleged in the complaint tending to show that the stock trustees needlessly or improperly acted upon the corporation the payment of a real estate brokerage commission; or that the stock trustees obtained or could have obtained an offer of \$25,000 for the property from Belmont or from anyone else without the intervention of the real estate broker. In the period from April 21, 1941, when the conditional contract between the stock trustees and Belmont was announced, until June 13, 1941, when plaintiff's complaint was dismissed, she brought forth no offer of any kind, with or without commission, to compare with the Belmont offer. As to the item of \$750 for "cost of returning first mortgage loan," no facts are alleged to show that the sale could be consummated without incurring such cost or that the defendant trustees proposed and intended to improperly or fraudulently impose such costs upon the defendant corporation. As to the fees of the trustees and their attorneys in the amounts, respectively, of \$25 and \$600 for their services in connection with the sale of the property and the dissolution of the corporation, also referred to in par. 14, it does not appear from the complaint that upon the consummation of the sale such fees would constitute an improper charge or that they were unreasonable in amount.

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incidental to the granting of an injunction to restrain the sale.

Since, as we have heretofore pointed out, the allegations of the complaint failed to support plaintiff's prayer for an accounting, such complaint must be considered as seeking an injunction only, and since her motion for an injunction and the proceedings on said motion are not shown by the record before us on this appeal, it must be assumed that the order denying the temporary injunction was required by the case presented on the motion. In Leonard v. Garland, 157 Ill. App. 355, the court said at p. 357:

"This bill is an appeal by complainants below from the decree dismissing the bill. This appeal does not bring up for review the order denying the motion for an injunction, and, if it did, the proofs upon which that motion was heard and decided are not preserved in the record. We must therefore assume that the order denying the injunction was required by the case presented upon the hearing of that motion. The bill was for an injunction only, and the court might properly have then dismissed the bill, Titus v. Mabes, 25 Ill. 232; Goddard v. C. & N. W. Ry. Co., 202 Ill. 362. That which the court could properly have done on November 14, 1908 [when the motion for injunction was heard and denied], it did not lose the power to do by its delay in entering the dismissal [on July 7, 1929]. As the bill was for an injunction only and the court properly denied the motion for an injunction, the decree dismissing the bill must be sustained."

While the Supreme court reversed that case on other grounds in Leonard v. Garland, 252 Ill. 300, it sustained the propositions that the appeal from the order of dismissal did not carry with it an appeal from the order denying a temporary injunction; and that if it was apparent on the face of the complaint that it was without equity and could not be made good by amendment, it was proper to follow the order denying the preliminary injunction with an order dismissing the bill for want of equity. There the court said at p. 382:

"The bill was for injunction, only. Plaintiffs in error contend the motion to dismiss should be treated as a general demurrer to the bill and be denied unless the bill shows a want of equity upon its face. Whether the court erred in refusing the preliminary injunction is not involved at this time. There is no certificate of evidence in the record showing what facts were before the court on the hearing of the preliminary motion. Reasons

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may have existed which would justify the court in refusing the temporary injunction other than a failure of the bill to show a case for equitable relief. A motion to dissolve a temporary injunction for want of equity in the bill, under the rule established in this state, operates as a demurrer to the bill and is considered as an admission of the material allegations thereof. The decree dissolving such injunction is, in effect, a denial of the relief sought, and the bill may be at once dismissed and the action of the court reviewed on error or appeal. (Titus v. Mabee, 25 Ill. 232; Shaw v. Hill, 67 id. 455; Smith v. Kockersperger, 173 id. 201; Weaver v. Poyer, 70 id. 567; Heinroth v. Kochersperger, 173 id. 205). The same rule applies when the injunction is the only relief sought and the motion to dissolve is heard upon bill, answer and affidavits. In such case the dissolution of the injunction may be treated as a final disposition of the cause, from which an appeal will lie. (High on Injunction, sec. 1706; Prout v. Lomer, 79 Ill. 331; American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 id. 210.) The practice is similar and is followed with like results where a court denies a motion for a preliminary injunction on a bill filed only for injunctive relief, where there is no equity in the bill and it is apparent that it cannot be made good by amendments. (Thomas v. Adams, 30 Ill. 37; Vieley v. Thompson, 44 id. 9; Hummert v. Schwab, 54 id. 142; Brockway v. Rowley, 66 id. 99; Grimes v. Grimes, 143 id. 550; Canal Comrs. v. Village of East Peoria, 179 id. 214; Leonard v. Arnold, 244 id. 429.)"

It has been repeatedly held that when a complaint is filed in equity for injunctive relief only and plaintiff's motion for injunction is denied or if a preliminary injunction is granted and dissolved, dismissal of the complaint follows as a matter of course, either on the court's own motion or on the defendant's motion or on plaintiff's own motion, so that the plaintiff may proceed at once with an appeal. (Field v. Village of Western Springs, 181 Ill. 186; Goddard v. C. & N. W. Ry. Co., 202 Ill. 362; Spies v. Byers, 287 Ill. 627; and Wendt v. City of Elgin, 264 Ill. App. 433.)

In Field v. Village of Western Springs, *supra*, the court said at pp. 190, 191:

"It has been held by this court that where a bill for injunction, only, is before the court, and a temporary injunction has been granted, a motion to dissolve the injunction for want of equity has the same effect as a demurrer to the bill, and the court, on sustaining the motion to dissolve the injunction, may properly dismiss the bill, and is not required to retain the same for hearing on pleadings and proofs. (Titus v. Mabee, 25 Ill. 257; Weaver v. Poyer, 70 id. 567; Prout v. Lomer, 79 id. 331; Live Stock Commission Co. v. Live Stock Exchange, 143 id. 210.) On principle, the same rule would prevail where a bill is filed for injunction only, which, on hearing, is refused. The bill may, in such case,



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be dismissed for want of equity for the same reason as in a case where a preliminary injunction has been granted and a motion has been entered to dissolve the same. In this case the bill is for injunction only, and on motion for an injunction, which is refused by the chancellor because of the want of equity in the bill, it was not error to refuse to allow the defendant to answer; nor was it error, if the bill was without equity, to dismiss the same on the refusal of the injunction."

In our opinion plaintiff's complaint did not state a good cause of action for injunctive relief. Since it does not appear from the complaint that either the trust agreement or the bylaws of the corporation provided for a sale at public auction as demanded by plaintiff rather than a sale by private negotiation, it was within the discretion of the stock trustees to choose the method of sale which in their judgment was preferable. It is not the function or policy of a court of equity to interfere with the exercise by trustees of discretionary powers conferred on them by a trust agreement so long as such powers are exercised honestly and reasonably. In the exercise of their discretion the defendant trustees entered into the contract for the sale of the corporate property to the purchaser Melmed for \$57,000, which contract contained the condition that it would not be consummated if it was objected to in writing by the holders of trust certificates for 33-1/3% or more of the shares of stock of the corporation and which also contained the further condition that the purchaser had the option to match any better offer that might be made for the property. Defendant stock trustees sent a notice to all of the certificate holders advising them fully as to the terms of the contract of sale and informing them of their right to dissent in writing within twenty days if they did not approve of the terms of the sale. The notice was sent to the certificate holders on April 21, 1941 and in so far as the record discloses none of said certificate holders dissented from the terms of the sale with the possible exception of plaintiff. Immediately upon the expiration of the twenty day period for dissents, plaintiff filed



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her complaint on May 12, 1941 and notice of her motion for a temporary injunction to restrain the consummation of the sale.

Plaintiff does allege in her complaint, by way of conclusion, that the price offered by Melmed for the property was insufficient and inadequate, but from the facts alleged therein the \$57,000 sale price for the property specified in the contract seems to be fairly adequate. The primary purpose of the complaint was to restrain the sale negotiated by the stock trustees so that the property might be sold at public auction, whereby, it was alleged a better price could or might be obtained as a result of competitive bids. The difficulty with plaintiff's position in this regard is that under the stock trust agreement the trustees were permitted in the exercise of their discretion to dispose of the property at private sale and there is no showing made that the trustees abused their discretion or that the contract of sale was tainted with fraud or dishonesty. Plaintiff intimates that a higher price might be procured if the property were sold at public auction is mere speculation.

Plaintiff criticizes the sale recommended to the certificate holders by the stock trustees but offers no assurance that if this sale were abandoned, a resale would produce a better price. In the case of judicial sales, it has been repeatedly held that one who attacks such a sale on the ground of inadequacy of price and demands a resale should furnish a guaranty that the resale will produce a higher price, such guaranty to be secured by bond or an adequate cash deposit. (Barnes v. Henshaw, 226 Ill. 605.) There is no reason in principle why this rule should not apply to the situation presented here where the holder of only ten shares of stock desires to upset a private sale of the corporate property, which is apparently satisfactory to the holders of the remaining 1077 shares. Plaintiff's complaint contains no allegation that is not entirely con-

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sistent with the fact that the sale of the property to Melmed at \$57,000 with brokerage commission of \$2,710 payable to Morris B. DeWoskin & Co., was satisfactory to all the certificate holders except her. There can be no question but that the stock trustees and the assenting certificate holders, so long as they acted honestly and in good faith, and there was nothing in the complaint to show that they did not so act, were at liberty to choose the method of sale which in their judgment would produce the best result. "So long as the trustee is exercising the discretionary powers conferred upon him honestly and reasonably, a court of equity has no right to interfere." Martin v. McCune, 318 Ill. 585. In view of the fact that plaintiff offered no assurance that, if the sale to Melmed were not consummated the property could be sold at a better price, a court of equity would not be justified in subjecting the holders of certificates for 1077 shares of the corporate stock to the speculative risk of a resale of the property at public auction at the demand, or should we say at the mere whim, of a holder of ten shares of said stock. As to the provision in the contract of sale giving Melmed, the purchaser, the right or option to match any higher offer made for the property, we think that under all the circumstances said provision was entirely fair and equitable.

When twenty days passed after the submission by the stock trustees to the certificate holders of the terms of the sale, without dissents by the holders of certificates for one-third or more of the shares and without a higher offer for the property, the trustees became legally and equitably bound to cause the corporation to consummate the sale and the purchaser became legally and equitably entitled to receive a deed upon payment of the balance of the purchase price. It does not appear from the complaint how the sale to Melmed, who was not a party to this proceeding, could be voided without violating his legal and equitable rights. We are impelled



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to hold that the complaint shows on its face that the sale of the corporate property by the defendant trustees to Melmed was made in conformity with the method prescribed by the stock trust agreement.

As to plaintiff's contention that the trial court erred in denying her leave to file an amended complaint after it had dismissed her original complaint for want of equity, it is sufficient to state that she at no time preferred an amendment or amendments or an amended complaint or indicated how her complaint could be amended to state a good cause of action, either for injunction or accounting. The insufficiency of her complaint was not merely formal. It was fundamental and irremediable. No change in the form of the allegations of her complaint could obviate the complete lack of equity in her demand that the Melmed contract be repudiated, regardless of the consequences to the corporation and its shareholders, simply because plaintiff desired to experiment with another method of sale. It is readily apparent that plaintiff's complaint could not be made good by amendment. Liberality of amendment did not require the trial court to aid in prolonging a suit of this nature.

We think the language used by the court in Danmeyer v. Coleman, 11 Fed. 97, is peculiarly applicable to the complaint filed herein. There the court stated at p. 101:

"It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, de minimis no curat lex, very properly applicable \*\*\*."

For the reasons stated herein the orders of the Circuit court are affirmed.

ORDERS AFFIRMED.

Scanlon, P. J., and Friend, J., concur.

to hold that the complaint shows on its face that the sale of the corporate property by the defendant trustees to himself was made in conformity with the method prescribed by the stock trust agreement.

As to Plaintiff's contention that the trial court erred in denying her leave to file an amended complaint after it had dismissed her original complaint for want of equity, it is sufficient to state that she at no time proffered an amendment or amendments or an amended complaint or indicated how her complaint could be amended to state a good cause of action, either for injunction or accounting. The insufficiency of her complaint was not merely formal. It was fundamental and irreparable. No change in the form of the allegations of her complaint could obviate the complete lack of equity in her demand that the alleged contract be repudiated, regardless of the consequences to the corporation and its shareholders, simply because Plaintiff desired to experiment with another method of sale. It is readily apparent that Plaintiff's complaint could not be made good by amendment. Liberality of amendment did not require the trial court to aid in prolonging a suit of this nature.

We think the language used by the court in Dannover v. Coleman, 11 Fed. 97, is peculiarly applicable to the complaint filed herein. There the court stated at p. 101:

"It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, de minimis non curat lex, very properly applicable."

For the reasons stated herein the order of the Circuit court is affirmed.

ORDERS AFFIRMED.

Concluded, p. 1, and Friend, 5, cement.



DOROTHY SCHREIBER, GEORGE  
LOVEWELL and ALVERA LOVEWELL,  
Appellees,

vs.

CATHERINE LOVEWELL, also known  
as KATIE KELLY and KATIE IRWIN,  
et al.,  
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

314 I.A. 201'

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant seeks to reverse certain portions of the decree entered herein.

Plaintiffs, Dorothy Schreiber, George Lovewell and Alvera Lovewell, filed a complaint on October 31, 1940, in which they alleged that their father, Alva J. Lovewell, after having been previously divorced from his first wife, who was their mother, entered into a marriage ceremony with the defendant, Catherine Lovewell, on September 4, 1936; that prior to said marriage the defendant had been divorced from her former husband, John Kelly; that her divorce from Kelly was "null and void;" that her purported marriage to their father was invalid because he was insane when the marriage ceremony was performed and, therefore, incompetent to enter into a valid marriage; and that their father, Alva J. Lovewell, was adjudged insane October 30, 1940 and committed to the Elgin State Hospital for the Insane, where he died October 20, 1940.

The complaint sought to have defendant's divorce from her former husband and her marriage to plaintiffs' father declared invalid and set aside and asked for an accounting from her concerning all her dealings with their father since the date of her marriage to him. The complaint concluded with the prayer that defendant be compelled to account for the proceeds of

DOROTHY SCHREIBER, GEORGE  
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3141A.201

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mother, entered into a marriage ceremony with the defendant, Cath-

erine Lovewell, on September 4, 1938; that prior to said marriage

the defendant had been divorced from her former husband, John

Kelly; that her divorce from Kelly was "null and void;" that her

purported marriage to their father was invalid because he was in-

sane when the marriage ceremony was performed and, therefore, in-

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divorce from her former husband and her marriage to plaintiffs'

father declared invalid and set aside and asked for an accounting

from her concerning all her dealings with their father since the

date of her marriage to him. The complaint concluded with the

prayer that defendant be compelled to account for the proceeds of

certain insurance policies and the proceeds of the sale of certain property in Evanston, Illinois, which was held in joint tenancy in the name of defendant and Alva J. Lovewell. It also asked that deeds, which created a joint tenancy in defendant and Alva J. Lovewell in certain vacant lots in Chicago theretofore owned by Alva J. Lovewell, be declared invalid because of his incompetency to create said joint tenancy. Defendant's answer denied all of the material allegations of the complaint.

Inasmuch as the decree declared that defendant's divorce from her former husband and her marriage to Alva J. Lovewell were valid and that she was entitled to receive the proceeds of the insurance policies in question and no appeal was taken from the portions of the decree involving such matters, those issues having been finally determined, are eliminated. The portions of the decree from which this appeal is taken are as follows:

"The court further finds that the said Alva J. Lovewell was on May 8, 1940 the owner of certain real estate, described in the bill of complaint, and herein described as follows: [Here follows description of lots in Chicago, Illinois.] "that said lots are vacant and unimproved; that on said date, to-wit: May 5, 1940, the said Alva J. Lovewell signed, executed and delivered deeds to create a joint tenancy title in and to the said three vacant lots, in the name of himself and his wife, Catherine Lovewell; that at the time of the signing of the said deeds and creating the said joint tenancy title, the said Alva J. Lovewell was incompetent, insane and his act and actions hereby adjudged void, illegal, unlawful and not binding upon him by reason of his want of mental capacity.

\* \* \* \*

"It is Further Ordered, Adjudged and Decreed that the money deposited with the First National Bank of Chicago and standing in the name of Catherine Lovewell, being Savings Account



certain insurance policies and the proceeds of the sale of certain property in Evanston, Illinois, which was held in joint tenancy in the name of defendant and Alva J. Lovewell. It also asked that deeds, which created a joint tenancy in defendant and Alva J. Lovewell in certain vacant lots in Chicago heretofore owned by Alva J. Lovewell, be declared invalid because of his incompetency to create said joint tenancy. Defendant's answer denied all of the material allegations of the complaint. Inasmuch as the decree declared that defendant's

divorce from her former husband and her marriage to Alva J. Lovewell were valid and that she was entitled to receive the proceeds of the insurance policies in question and no appeal was taken from the portions of the decree involving such matters, those issues having been finally determined, are eliminated. The portions of the decree from which this appeal is taken are as follows:

"The court further finds that the said Alva J. Lovewell was on May 8, 1940 the owner of certain real estate, described in the bill of complaint, and herein described as follows: [Here follows description of lots in Chicago, Illinois.] "That said lots are vacant and unimproved; that on said date, to-wit: May 8, 1940, the said Alva J. Lovewell attempted, executed and delivered deeds to create a joint tenancy title in and to the said three vacant lots in the name of himself and his wife, Catherine Lovewell; that at the time of the signing of the said deeds and creating the said joint tenancy title, the said Alva J. Lovewell was incompetent, insane and his act and actions hereby adjudged void, illegal, unlawful and not binding upon him by reason of his want of mental capacity.

\*\*\*

"It is further Ordered, Adjudged and Decreed that the money deposited with the First National Bank of Chicago and standing in the name of Catherine Lovewell, being Savings Account

No. 1309235, and admitted by the answer of the said defendant, to be of a present balance of Three Thousand Five Hundred Forty Dollars \* \* \* be and the same is hereby declared to be the property of the said Catherine Lovewell and the heirs at law of Alva J. Lovewell, deceased; that the said Catherine Lovewell has a one-half interest in said fund and the remainder shall be divided share and share alike among the heirs at law of Alva J. Lovewell, deceased; the said First National Bank is directed to make payment as herein provided, upon presentation of a certified copy of this decree."

The cause was referred to a master in chancery and the pertinent portions of his report are as follows:

"ISSUES.

"The capacity of Alva J. Lovewell to understand the transfer of the vacant lots on May 8, 1840, in the name of himself and Catherine Lovewell, as joint tenants, and the validity of said transfer.

"The capacity of Alva J. Lovewell to understand the transfer of the Evanston property on September 4, 1837, in the name of himself and Catherine Lovewell, as joint tenants, and the validity of said transfer.

"The capacity of Alva J. Lovewell to understand the transfer of the home in Evanston from himself and wife to strangers to this transaction from which there was received approximately \$4,500.00, and to whom the proceeds of said sale belonged, most of which is in possession of certain defendants, subject to the order of this court.

"EVIDENCE.

"The plaintiffs are the children of Alva J. Lovewell by a former marriage, and are all of legal age.

"Alva J. Lovewell did own the vacant property at the time of his marriage to said Catherine Lovewell and at the time of





his death was held in joint tenancy with said Catherine Lovewell, the transfer having been made on May 8, 1940.

"The home in Evanston, Illinois, was sold prior to the death of Alva J. Lovewell, after the same had been placed in joint tenancy with said Catherine Lovewell, and there was received certain funds, \$3,540.00 of which is in a savings account in the First National Bank of Chicago in the name of Catherine Lovewell.

\* \* \* \*

"Alva J. Lovewell was declared insane by the County Court of Cook County, Illinois, on October 3, 1940, and committed to the Elgin State Hospital for the Insane, where he died on October 20, 1940, and medical proof was produced showing that said mental illness of said Alva J. Lovewell was not of a sudden nature on October 3, 1940, but was a condition which had been in existence for several years, and that said Alva J. Lovewell had worked regularly for the Chicago Surface Lines as a motorman up to August 2, 1939, when his work was discontinued because of an accident had by said Alva J. Lovewell through his fault, for no apparent reason, indicating a mental illness at that time.

"There is no definite date as to the beginning of his mental illness or as to the extent thereof from time to time, from the date of his divorce in 1936, except for his action and the definite proof of insanity on October 3, 1940, except that he was examined by a psychiatrist on November 27, 1939, who pronounced him definitely insane.

"FINDINGS.

"From all the competent evidence, I find that said Alva J. Lovewell was insane on August 2, 1939, and continuously thereafter, to such an extent and degree that any attempted actions or acts of his would not be legal, lawful and binding upon him by reason of his mental condition, but prior to said date I

the bank was held in joint tenancy with said Catherine Lovewell, and the transfer having been made on May 8, 1940.

The bank in question, Illinois, was sold prior to the death of Mrs. J. Lovewell, after the same had been placed in joint tenancy with said Catherine Lovewell, and there was receipt of certain funds, \$2,400.00 of which is in a savings account in the First National Bank of Chicago in the name of Catherine Lovewell.

\*\*\*

"Mrs. J. Lovewell was declared insane by the County Court of Cook County, Illinois, on October 3, 1940, and committed to the Illinois State Hospital for the Insane, where she died on December 3, 1940, and medical proof was produced showing that said illness of said Mrs. J. Lovewell was not of a sudden nature on December 3, 1940, but was a condition which had been in existence for several years, and that said Mrs. J. Lovewell had written regularly for the Chicago Tribune as a columnist up to August 1, 1939, when she was discontinued because of an accident had said Mrs. J. Lovewell through the Tribune for no apparent reason, indicating a mental illness at that time.

"There is no definite date as to the beginning of the mental illness or as to the extent thereof from time to time, from the date of her divorce in 1938, except for the fact that the definite proof of insanity on October 3, 1940, except that he was examined by a psychiatrist on November 17, 1939, and pronounced his definitely insane.

"FINDINGS.

"From all the competent evidence, I find that said Mrs. J. Lovewell was insane on August 3, 1939, and continuously thereafter, to such an extent and degree that any attempted actions or acts of the said Mrs. Lovewell, legal and binding upon him by reason of her mental condition, but prior to said date I

am constrained to make any such findings as to any actions or acts of the said Alva J. Lovewell testified to and complained of herein.

\* \* \*

"In conclusion, I recommend that all transactions complained of by said plaintiffs, made by said Alva J. Lovewell after August 2, 1939, wherein said defendant Catherine Lovewell benefited thereby, be set aside and held for naught; that said Catherine Lovewell account for any such benefits derived from any such transactions, and that the proceeds of such accounting be subject to the orders of this Court, consistent with the status of said funds, as though they were in the hands of said Alva J. Lovewell as of said date."

Since no exceptions were made to the evidence and findings reported by the master and since the master's report was "in all respects confirmed and approved by the court," the facts found in said report are not open to dispute. The court decreed in accordance with the master's recommendation that "the said Alva J. Lovewell became mentally incapacitated on August 2, 1939, and continuously thereafter to such an extent and degree that any attempted actions or acts of his would not be legal, lawful and binding upon him by reason of his mental condition, and that his insanity commenced with said date, to wit: August 2, 1939, but that his actions or acts prior to that date were in every way legal and done by him in possession of sufficient mental capacity."

Defendant is bound by the foregoing findings of the master as confirmed by the court's decree and her contention that the trial court "should have sustained the deed executed by Alva J. Lovewell on May 4, 1940, creating a joint tenancy between himself and Catherine Lovewell, his wife, in Lots 1, 2 and 3 in Block 1 in Fullerton Avenue Manor, vacant and unimproved" is without merit. Since Lovewell was found to be insane on August 2, 1939 and continuously thereafter until the time of his death, and absolutely lacking in mental capacity, it necessarily follows that his deed



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"In conclusion, I recommend that all transactions complained of by said plaintiffs, made by said Alva J. Lovewell after August 2, 1939, wherein said defendant Catherine Lovewell benefited thereby, be set aside and held for naught; that said Catherine Lovewell account for any such benefits derived from any such transactions, and that the proceeds of such accounting be subject to the orders of this Court, consistent with the status of said funds, as though they were in the hands of said Alva J. Lovewell as of said date."

Since no exceptions were made to the evidence and

findings reported by the master and since the master's report was "in all respects confirmed and approved by the court," the facts found in said report are not open to dispute. The court deemed in accordance with the master's recommendation that "the said Alva J. Lovewell became mentally incompetent on August 2, 1939, and continuously thereafter to such an extent and degree that any attempted actions or acts of his could not be legal, lawful and binding upon him by reason of his mental condition, and that his insanity commenced with said date, to wit: August 2, 1939, but that his actions or acts prior to that date were in every way legal and done by him in possession of sufficient mental capacity."

Defendant is bound by the foregoing findings of the master as confirmed by the court's decree and her contention that the trial court "should have sustained the deed executed by Alva J. Lovewell on May 4, 1940, creating a joint tenancy between himself and Catherine Lovewell, his wife, in Lots 1, 2 and 3 in Block 1 in Fullerton Avenue Manor, vacant and unimproved" is without merit. Since Lovewell was found to be insane on August 2, 1939 and continuously thereafter until the time of his death, and absolutely lacking in mental capacity, it necessarily follows that his deed

of his vacant lots to a third party and the deed of said lots back to himself and his wife in joint tenancy on May 14, 1940, were invalid. In support of her instant contention defendant cites a line of cases to the effect that a mere impairment of memory by reason of advanced years does not of itself indicate a want of power to comprehend a particular transaction and to dispose of property in such a transaction. (English v. Porter 109 Ill. 285; Kelly v. Nusbau, 244 Id. 158; Riordan v. Murray, 249 Id. 517; Ludewick v. Ludewick, 279 Id. 27; Bordner v. Kelso, 293 Id. 175; Harrington v. Travis, 349 Id. 606.) None of these cases deals with a person who is definitely insane and utterly lacking in mental capacity and they are readily distinguishable from the case at bar. They are concerned with individuals who "may be to some extent impaired by age or disease," or "who may be impaired by disease incidental to old age." or where there is "mere impairment of memory by reason of advanced years" or with a person who is "to some extent impaired by age" or where there exists "old age eccentricity or even partial impairment of mental faculties." In our opinion the chancellor properly found that there was no joint tenancy created in the vacant lots in question and that the sole title in and to such lots was vested in Alva J. Lovewell at the time of his death.

As heretofore shown, Alva J. Lovewell and the defendant were married September 4, 1936. At the time of said marriage Lovewell owned a vacant lot on Brummel street in Evanston, Illinois. In 1937 he built a home on this property and created a joint tenancy as to these premises in himself and defendant on September 4, 1937. Lovewell and his wife entered into a contract for the sale of the Evanston property on May 10, 1940 and at that time they executed a warranty deed transferring said property to the purchaser. On September 1, 1940, when the sale was consummated, they received for their equity \$3,540, which was deposited in a savings account in the First National Bank of Chicago in

of his vacant lots to a third party and the deed of said lots back to himself and his wife in joint tenancy on May 14, 1940, were invalid. In support of her instant contention defendant cites a line of cases to the effect that a mere impairment of memory by reason of advanced years does not of itself indicate a want of power to comprehend a particular transaction and to dispose of property in such a transaction. (English v. Porter, 109 Ill. 288; Kelly v. Neenan, 244 Ill. 188; Riordan v. Murray, 249 Ill. 517; Ludewick v. Ludewick, 279 Ill. 27; Borden v. Kelso, 283 Ill. 175; Harrington v. Travis, 343 Ill. 808.) None of these cases deals with a person who is definitely insane and utterly lacking in mental capacity and they are readily distinguishable from the case at bar. They are concerned with individuals who "may be to some extent impaired by age or disease," or "who may be impaired by disease incidental to old age," or where there is "mere impairment of memory by reason of advanced years" or with a person who is "to some extent impaired by age" or where there exists "old age eccentricity or even partial impairment of mental faculties." In our opinion the chancellor properly found that there was no joint tenancy created in the vacant lots in question and that the sole title in and to such lots was vested in Alva J. Lovewell at the time of his death.

As heretofore shown, Alva J. Lovewell and the defendant were married September 4, 1936. At the time of said marriage Lovewell owned a vacant lot on Brunner street in Evanston, Illinois. In 1937 he built a home on this property and created a joint tenancy as to these premises in himself and defendant on September 4, 1937. Lovewell and his wife entered into a contract for the sale of the Evanston property on May 10, 1940 and at that time they executed a warranty deed transferring said property to the purchaser. On September 1, 1940, when the sale was consummated, they received for their equity \$2,340, which was deposited in a savings account in the First National Bank of Chicago in



defendant's name. As already shown, the chancellor decreed that this fund of \$3,540 "be and the same is hereby declared to be the property of the said Catherine Lovewell and the heirs at law of Alva J. Lovewell, deceased; that the said Catherine Lovewell has a one-half interest in said fund and the remainder shall be divided share and share alike among the heirs at law of Alva J. Lovewell, deceased; the said First National Bank is directed to make payment as herein provided, upon presentation of a certified copy of this decree."

Defendant contends that "the Court should have decreed that the proceeds received from the sale of the improved real estate at 1525 Brummel Street, Evanston, amounting to \$3540.00 which were deposited intact in the First National Bank of Chicago, in the name of Catherine Lovewell, with the knowledge and consent of Alva Lovewell, belonged to Catherine Lovewell absolutely," because (1) "a joint tenancy title existed as to said funds on deposit between Alva J. Lovewell and Catherine Lovewell, being the proceeds of the sale of real estate owned as joint tenants," and because (2) "A gift from the husband to the wife of said funds is presumed."

There is no merit in defendant's contention that a joint tenancy with the right of survivorship existed between her and Alva J. Lovewell as to the funds on deposit in the bank, which represents the proceeds of the sale of the property. It does not clearly appear how defendant came into possession of the proceeds of the sale, but in any event she did not even pretend to preserve any joint ownership in or title to such funds but deposited same in her own name and account.

Section 2, Chap. 76, Ill. Rev. Stat. 1939, provides in part as follows:

"Except as to executors and trustees, and except also where by will or other instrument in writing expressing an intention to create a joint tenancy in personal property with the right of survivorship, the right or incident of survivorship as between

defendant's name. As already shown, the chancellor decreed that this fund of \$5,840 "be and the same is hereby declared to be the property of the said Catherine Lovewell and the heirs at law of Alva J. Lovewell, deceased; that the said Catherine Lovewell has a one-half interest in said fund and the remainder shall be divided share and share alike among the heirs at law of Alva J. Lovewell, deceased; the said First National Bank is directed to make payment as herein provided, upon presentation of a certified copy of this decree."

Defendant contends that "the Court should have decreed that the proceeds received from the sale of the improved real estate at 1825 Brumel Street, Evanston, amounting to \$344.00 which were deposited intact in the First National Bank of Chicago, in the name of Catherine Lovewell, with the knowledge and consent of Alva Lovewell, belonged to Catherine Lovewell absolutely," because (1) "a joint tenancy title existed as to said funds on deposit between Alva J. Lovewell and Catherine Lovewell, being the proceeds of the sale of real estate owned as joint tenants," and because (2) "a gift from the husband to the wife of said funds is presumed."

There is no merit in defendant's contention that a joint tenancy with the right of survivorship existed between her and Alva J. Lovewell as to the funds on deposit in the bank, which represents the proceeds of the sale of the property. It does not clearly appear how defendant came into possession of the proceeds of the sale, but in any event she did not even pretend to preserve any joint ownership in or title to such funds but deposited same in her own name and account.

Section 2, Chap. 78, Ill. Rev. Stat. 1937,

provides in part as follows:

"Except as to executors and trustees, and except also where by will or other instrument in writing expressing an intention to create a joint tenancy in personal property with the right of survivorship, the right or incident of survivorship as between

joint tenants or owners of personal property is hereby abolished, and all such joint tenancies or ownerships shall, to all intents and purposes, be deemed tenancies in common \* \* \*."

Here no instrument in writing was executed as to the funds on deposit in the First National Bank "expressing an intention to create a joint tenancy in personal property with the right of survivorship." We are impelled to conclude that there was no joint tenancy between Alva J. Lovewell and the defendant, his wife, in the funds in question.

As to defendant's contention that "a gift from the husband to the wife of said funds is presumed," it is sufficient to state that Alva J. Lovewell did not on September 1, 1940, when the money was received by defendant from the sale of the property, have the legal capacity to make a gift inasmuch as he had been insane continuously since August 2, 1939.

Both plaintiffs and defendant contend that the chancellor erred as to the manner in which he directed that the funds in the First National Bank should be distributed. The decree is ambiguous and it must be construed for the purpose of clarifying its provisions pertaining to said funds in said bank.

It will be noted that the decree directed that half of the \$3,540 on deposit in the First National Bank of Chicago be paid to defendant and that the other half be "divided share and share alike among the heirs at law of Alva J. Lovewell, deceased." Plaintiffs were ~~the~~ heirs at law of Lovewell and so was defendant one of his heirs at law. We think that the language used in the decree, fairly and reasonably construed, was intended to mean that half of the funds in question belonged to Alva J. Lovewell prior to his death and that the other half belonged to defendant. Since Lovewell died intestate his share of the funds must necessarily be distributed according to the provisions of the Descent Act (Chap. 39 Ill. Rev. Stat. 1939.) While the decree states that "the remainder [Alva J. Lovewell's half of the proceeds of the sale] should be divided share and share alike among the heirs at law of Alva J. Lovewell,"



joint tenants or owners of personal property is hereby abolished, and all such joint tenancies or ownerships shall, to all intents and purposes, be deemed tenancies in common \* \* \*."

Here no instrument in writing was executed as to the funds on deposit in the First National Bank "expressing an intention to create a joint tenancy in personal property with the right of survivorship." It is liable to conclude that there was no joint tenancy between Alva J. Lovewell and the defendant, his wife, in the funds in question.

As to defendant's contention that "a gift from the husband to the wife of said funds is presumed," it is sufficient to state that Alva J. Lovewell did not on September 1, 1940, when the money was received by defendant from the sale of the property, have the legal capacity to make a gift inasmuch as he had been insane continuously since August 2, 1939.

Both plaintiff and defendant contend that the chancellor erred as to the manner in which he directed that the funds in the First National Bank should be distributed. The decree is ambiguous and it must be construed for the purpose of clarifying its provisions pertaining to said funds in said bank.

It will be noted that the decree directed that half of the \$3,540 on deposit in the First National Bank of Chicago be paid to defendant and that the other half be "divided share and share alike among the heirs at law of Alva J. Lovewell, deceased." Plaintiff's evidence shows that Alva J. Lovewell died and so was defendant one of his heirs at law. He thinks that the language used in the decree, fairly and reasonably construed, was intended to mean that half of the funds in question belonged to Alva J. Lovewell prior to his death and that the other half belonged to defendant. Since Lovewell died intestate his share of the funds must necessarily be distributed according to the provisions of the Decedent Act (Chap. 35 Ill. Rev. Stat. 1939). While the decree states that "the remainder [Alva J. Lovewell's half of the proceeds of the sale] should be divided share and share alike among the heirs at law of Alva J. Lovewell,"

the chancellor could not under the law, even if he had been so inclined, preclude defendant from participating as the surviving widow of Alva J. Lovewell in the distribution of his personal property. The distribution could not be made to the "heirs at law" share and share alike because subsection 4 of section 1 of the foregoing statute provides:

"When there is a widow or a surviving husband and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive as his or her absolute personal estate, one-third of all the personal estate of the intestate \* \* \*."

Therefore defendant is entitled to receive half of the fund of \$3,540 or \$1,770 and in addition thereto one third of Alva J. Lovewell's half of said fund or \$590, amounting in all to \$2,360. The balance of the fund in the First National Bank of Chicago, amounting to \$1,180, should be distributed share and share alike to plaintiffs.

For the reasons stated herein the decree of the Superior court is affirmed in part and reversed in part and the cause is remanded with directions to enter a decree in conformity with the views herein expressed.

AFFIRMED IN PART  
REVERSED IN PART and  
REMANDED WITH DIRECTIONS.

Scanlan, P. J. and Friend, J., concur.

the objection could not arise, even if he had been so in-  
cluded, because defendant was participating as the surviving wife  
of Mrs. J. Lovell in the distribution of his personal property.  
The distribution could not be made to the heirs at law, there and  
share alike because subsection 4 of section 1 of the foregoing

statute provides:

"When there is a widow or a surviving husband and  
also a child or children or descendants of such child or children  
of the intestate, the law of surviving husband and wife prevails as  
his or her absolute personal estate, one-half of all the personal  
estate of the intestate."

Therefore defendant is entitled to receive half  
of the fund of \$3,500 or \$1,750 and in addition thereto one third of  
Mrs. J. Lovell's half of said fund or \$500, amounting in all to  
\$2,750. The balance of the fund in the first federal fund of  
\$1,100, should be distributed share and share  
alike to plaintiff.

For the reasons at the time the decree of the  
superior court is affirmed in part and reversed in part and the cause  
is remanded with directions to enter a decree in conformity with the  
views herein expressed.

WITNESSED my hand and  
seal at the City of New York  
this 10th day of June, 1914.

Charles F. J. and Thomas, Jr., counsel.



GEN. NO. 9739

AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1942.

MIDWEST INVESTMENT AND  
FINANCE COMPANY, a  
Corporation,

APPELLANT,

vs.

CLARA L. GATTON,

APPELLEE.

APPEAL FROM THE CIRCUIT  
COURT OF PEORIA COUNTY.

314 I.A. 201<sup>2</sup>

HUFFMAN, P. J.

Appellee was engaged in the secondhand car business in the city of Peoria. Appellant financed the conduct of this business. On May 12, 1938, it took judgment by confession against appellee in the sum of \$6372.71, consisting of \$5098.17, principal, and a 25% attorney fee amounting to \$1274.54. The judgment was based upon twenty-one separate instruments, consisting of two types. Six of the instruments are what is commonly called trust receipts. These arise out of a form of financing usually referred to as the floor plan. Under this plan, the dealer is financed for the cars he has on hand for retail sales. Fifteen of the instruments declared upon were promissory notes, bearing appellee's endorsement, arising from sales of cars by her to various purchasers.

U.S. DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20530

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA  
FILE NO. 100-100000

*[Handwritten signature]*  
*[Handwritten initials]*

31-1-A-201  
DOCT. OF THE DISTRICT COURT  
AT THE DISTRICT COURT

WILLIAM INVESTMENT AND  
FINANCIAL COMPANY, INC.  
INCORPORATED  
ATTORNEY  
CLARA L. GASTON  
FEDERAL

RETURNED TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA  
Specimen was returned to the respondent on the date of the return of the specimen  
in the case of the respondent. Specimen returned the respondent  
of this business. On May 22, 1953, it took judgment by  
consent of the respondent against the respondent in the sum of \$100,000.00, con-  
sisting of \$100,000.00, principal, and a 2% interest rate  
amounting to \$100,000.00. The judgment was based upon twenty-  
one separate instruments, consisting of two types. In  
all the instruments are that is commonly called trust  
receipts. These are of a form of financing usually  
referred to as the "trust plan". Under this plan, the deal-  
er is financed for the sale of goods on credit or retail sales.  
All of the instruments declared upon were promissory  
notes, bearing interest at 2% per annum, and were secured  
by a lien on the goods sold.

Upon motion of appellee, the judgment was opened up and leave given to plead. She alleges that it was the custom of appellant, in financing the sale of automobiles to purchasers, to withhold from her a certain amount upon each sale, termed a reserve account, and which reserve fund was to be paid to her within six months from the date of the transaction, with interest. She alleges that appellant had never paid any of the reserve funds upon such transactions, charging that the total of such sums so held in reserve by appellant, and then due her, amounted to \$4030.67. A bill of particulars was filed by her itemizing such accounts. Appellant admitted liability on these reserve accounts in the amount of \$3654.78.

Appellee filed counterclaim in which she set up that in 1936, she obtained a divorce from her husband in the Circuit Court of Peoria county, and that by the decree, she was awarded the sum of \$7000, as alimony; that prior to such time, her husband had many business transactions with appellant similar to those between appellee and appellant; that appellant was then holding more than \$7000, in a reserve account due to her husband; and that the divorce decree restrained appellant from paying to her husband any of such money. She alleges that subsequent to the decree and restraining order, and at the instance of appellant and her husband, she consented for the writ to be dissolved in consideration that her husband would assign to her \$2500, of his reserve account with appellant, and that appellant would pay to her this sum of money to apply upon her alimony.



Upon motion of appellee, the judgment was opened up and leave given to plead. The answer was that the custom of appellant, in financing the sale of automobiles to purchasers, to withhold from her a certain amount upon each sale, formed a reserve account, and which reserve fund was to be paid to her within six months from the date of the transaction, with interest. The answer was that appellant had never paid any of the reserve funds upon such transactions, charging that the total of such sums so held in reserve by appellant, and then due her, amounted to \$4030.67. A bill of particulars was filed by her itemizing such accounts. Appellant admitted liability on these reserve accounts in the amount of \$354.70. Appellee filed counterclaims in which she set up that in 1936, she obtained a divorce from her husband in the Circuit Court of Peoria county, and that by the decree, she was awarded the sum of \$7000, as alimony; that prior to such time, her husband had many business transactions with appellant similar to those between appellee and appellant; that appellant was then holding more than \$7000, in a reserve account due to her husband; and that the divorce decree restrained appellant from paying to her husband any of such money. The answer that respondent to the decree and restraining order, and at the instance of appellant and her husband, she consented for the wife to be dissolved in consideration that her husband would assign to her \$2500 of his reserve account with appellant, and that appellant would pay to her this sum of money to apply upon her alimony.

She further alleges that her husband and appellant so agreed, whereupon on motion of her husband, with her consent, the writ was dissolved. She charges that pursuant to the above agreement, appellant became liable to pay to her the sum of \$2500, which it had not done, although her husband did assign to her the agreed portion of his reserve account.

Appellant in its answer to the counterclaim, denies that it owed her former husband any money; denies that it promised to pay her \$2500, upon dissolution of the injunction; denies that it had anything to do with such dissolution; and alleges that it settled its accounts with her husband about four months after the injunction was dissolved.

The pleadings in the case are too extensive and involved to attempt to go into them. They take up each transaction, the details connected with the financing thereof, the charges, payments and credits thereon, and are so extended and involved that they cannot be set out within reasonable length. After the issues were finally settled, the case was tried by jury, which returned a verdict in favor of appellee for \$3300.00. The usual motions were filed by appellant, and denied. This appeal has followed from judgment on verdict.

Appellant makes twenty-three assignments of error. Appellee calls attention to the fact that assignments five to nineteen inclusive, are not included in the motion for a new trial. Examination of the record sustains this position of appellee, and those assignments will not be

The enclosed alleges that the defendant had deposited in the bank a sum of \$2500, which it was not to be used for the purpose of the defendant's business, and that the defendant had deposited in the bank a sum of \$2500, which it was not to be used for the purpose of the defendant's business, and that the defendant had deposited in the bank a sum of \$2500, which it was not to be used for the purpose of the defendant's business.

was dissolved.

[illegible]

Appellant claims that the evidence is not sufficient to establish that the appellants were in possession of the stolen property at the time of the arrest. Appellant claims that the evidence is not sufficient to establish that the appellants were in possession of the stolen property at the time of the arrest.



considered. Appellee urges certain matters which might properly be considered only by way of cross error, and no cross errors are assigned. Where but one party appeals, the other is bound by the judgment, order or decree of the trial court, and cannot be heard on review, except in support of the decree or judgment from which the other party has appealed. As above stated, the issues were extended and very much involved. The abstract consists of over two hundred pages, which renders it difficult to attempt any review of the evidence.

Appellant made motion for the cause to be referred to a referee to take testimony, stating that it involved an accounting between the parties upon twenty-two written instruments based upon thirty-three separate transactions, while appellee was basing her claim upon one hundred thirty-six instruments, and that the questions in dispute were so complicated and involved that it would be impossible for a jury to hear the testimony and arrive at a correct solution. The motion was denied.

Appellee states that appellant would advance her money to go to various cities to purchase used automobiles, and take the same to Peoria for resale. It appears her husband was engaged in the same kind of business for many years, and that appellant had financed his business. She states that after the injunction issued in the divorce proceedings, restraining appellant from paying any money to her husband from his reserve account, that Mr. Smith, the manager of appellant company, came to her and advised her that her husband had about \$7500, due him in his reserve account;



that the writ had tied up the business transactions between him and appellant so that they could not carry on; and stated to her that if she would consent for the writ to be dissolved, he would have her husband assign to her \$2500, of his reserve account, and that appellant company would thereupon pay her this amount of money. She states she agreed to this and that Mr. Gatton filed his motion to dissolve the writ. The motion recites the decree for divorce; the award of alimony; his dealings with appellant; that he then had a reserve account due him from appellant of \$7500.93; and that pursuant to an agreement between himself and appellee, it was provided that such writ might be dissolved. The motion further set out that Mr. Gatton had been engaged in the secondhand automobile business for more than twenty-five years in the city of Peoria; that appellant had financed his operations; that his business with appellant was so interrupted and interfered with by the injunction writ that it had deprived him of his ability to operate his business by preventing his obtaining the necessary funds from appellant. It appears that Mr. Smith, manager of appellant company, was present with Mr. and Mrs. Gatton, and the witness Wilder, at Mr. Gatton's place of business, when he assigned to appellee the \$2500, of his reserve account with appellant, pursuant to the agreement. Shortly after this, it appears appellant took possession of the cars Mr. Gatton then had on hand, and following the judgment taken against appellee, took possession of such cars as she had on hand.

The trial apparently consumed about four days, and so many conversations, transactions and accounts were



The trial apparently commenced about four days, and  
 there are said to have been  
 judgment taken against appellant, both possession of which  
 of the case Mr. Bettor had on hand, and following the  
 shortly after this, it appears appellant took possession  
 reserve account with appellant, however, so the agreement  
 business, then he assigned to appellee the \$500.00 of his  
 interest, and the witness stated, at Mr. Bettor's place of  
 manager of a bank, company, and present with Mr. Bettor,  
 necessary funds from appellant. It appears that Mr. Bettor  
 to operate his business by preventing his obtaining the  
 jurisdiction with that it had received him of the estate  
 appellant was so interrupted and interfered with by the  
 and had incurred his obligations; that his business with  
 than twenty-five years to the city of Seattle; that appellant  
 been engaged in the neighborhood around the business and was  
 dissolved. The parties together set out that Mr. Bettor had  
 self and appellee, it was provided that each with his own  
 of \$7500.00; and that payment to an agreement between him  
 that he then had a reserve account due his two obligations  
 divorce; the award of alimony; his dealing with appellant;  
 dissolving the writ. The matter rested the matter for  
 the agreed to this and that Mr. Bettor filed his motion to  
 would therefore pay her this amount of money. The matter  
 \$500.00 of his reserve account, and that appellant could  
 to be dissolved, he would have her husband assign to her  
 and stated to her that it was wrong content for the writ  
 from him and appellant as that they could not carry out  
 that the wife had filed in the business and was taking care

testified about that it is impossible to go into them in this opinion. Smith, manager of appellant company, insists that he never agreed with appellee to pay her the \$2500, due on Mr. Gatton's reserve account, stating as his reason, that Mr. Gatton was indebted to appellant for a larger sum than his reserve account totaled.

Appellee insists that the verdict is not only supported by the evidence but should have been for a larger sum. She claims that after allowing appellant all that it proved was due to it, she still had coming the sum of \$4273.11. These figures are arrived at from a review of the entire evidence together with all the extended accounts, some of which were in dispute. The record has been carefully reviewed. A majority of the questions involved in the trial were questions of fact for the jury. Appellant urges that the verdict is against the manifest weight of the evidence. This court does not feel that it can subscribe to this objection. Neither does the court find reversible error in the record. The judgment is therefore affirmed.

Judgment affirmed.

testified about that it is impossible to go into them in this opinion. Smith, manager of appellant company, testified that he never carried with appellant to pay him the \$2500, due on Mr. Watson's reserve account, stating in his answer, that Mr. Watson was indebted to appellant for a larger sum than his reserve account retained.

Appellant insists that the verdict is not only supported by the evidence but also it have been for a longer sum. The claims that after allowing appellant all that it proved due to it, she still had owing the sum of \$475.11. These figures are arrived at from a review of the entire evidence together with all the extended accounts, some of which were in dispute. The record has been carefully reviewed. A majority of the questions involved in the trial were questions of fact for the jury. Appellant urges that the verdict is against the weight of the evidence. This court does not feel that it can subscribe to this objection. Whether does the court find reversible error in the record. The judgment is therefore affirmed. Judgment affirmed.



IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1942.

314 I.A. 2021

DONALD H. FRY,

APPELLEE,

vs.

EDGAR J. BUTTERFIELD

and GAIL SCOTT,

APPELLANTS.

APPEAL FROM THE COUNTY

COURT OF WINNEBAGO COUNTY.

HUFFMAN, P. J.

On February 27, 1941, Scott was driving a gravel truck for Butterfield. It had been snowing for some time and several inches of freshly fallen snow was upon the ground. Prior to the snow, it had been sleeting for about two hours. Appellee owned a filling station located about ten miles north of the city of Rockford. The gasoline pumps were located upon a cement platform. The platform is level and about one hundred feet long and forty feet wide. Gravel driveways lead from the highway to the platform. Scott drove one of Butterfield's gravel trucks from the highway into this filling station. The truck was loaded. Scott was familiar with this station as he had stopped there on previous occasions. As he drove his truck into the station and applied the brakes, the front wheels skidded and struck

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IN THE DISTRICT COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA

RECEIVED: FEB. 27, 1941

8141.A.100

DOUGLAS, J. B.

APPELLEE

AT LARGE FROM THE COUNTY

COUNTY OF WASHINGTON, D.C.

EDGAR J. DOUGLAS

and CATHERINE

APPELLEE

WYOMING, P. D.

On February 27, 1941, Scott was driving a motor vehicle for Westfield. It had been running for some time and several inches of freshly fallen snow was upon the ground. Prior to the snow, it had been sleeting for about two hours. Appeltee owned a filling station located about ten miles north of the city of Rockford. The gasoline pumps were located upon a cement platform. The platform is level and about one hundred feet long and forty feet wide. Drives lead from the highway to the platform. Scott drove one of Westfield's travel trailers for the highway into this filling station. At times the loaded trailer was familiar with this station as he had stopped there on previous occasions. As he drove his trailer into the station and applied the brakes, the front wheels skidded and struck

a cooling machine used to cool soft drinks, which was at the side of the building. Evidence on behalf of appellee tended to prove damage of \$75.00 to the machine. The case originated in the Justice of the Peace court, and was on appeal from there to the county court. There were no pleadings. In the trial in the county court, the jury returned a verdict for appellee in the sum of \$65.00. Appellants have prosecuted this appeal from judgment rendered thereon.

The evidence is very brief and does not appear to be in dispute except with regard as to how far the cooling machine was displaced from its fixed position. Appellee claims the machine was pushed six feet, while Scott claims it was not pushed more than one foot. However, this has nothing to do with the damage to the machine. Scott testified as to the condition of the weather and the road. He states he thought there would be cinders underneath the snow, although he says that it had been sleeting for about two hours prior to the snow. He further says that he was familiar with this station, the approaches thereto, and the circumstances connected with driving under then existing conditions. The sum and substance of his testimony with respect to the accident is, that when he applied his brakes, the front wheels of the truck skidded and collided with the cooling machine. He states that he did not shift gears as he drove into the station, but denies that he was driving too fast.

It was a question of fact for the jury as to the negligence involved. The jury in the trial court had the opportunity of hearing the witnesses testify. It appears that other trucks and motor vehicles had been using the station that



a cooling machine used to cool soft drinks, which was at  
 the side of the building. A witness on behalf of appellee  
 tended to prove damage of \$73.00 to the machine. The case  
 originated in the Justice of the Peace court, and was on  
 appeal from there to the county court. There were no find-  
 ings. In the trial in the county court, the jury returned  
 a verdict for appellee in the sum of \$50.00. Appellee  
 have prosecuted this appeal from judgment rendered in common.  
 The evidence is very brief and does not appear to be  
 in dispute except with regard as to how far the cooling  
 machine was displaced from its former position. Appellee  
 claims the machine was pushed six feet, while both claim  
 it was not pushed more than one foot. However, this has  
 nothing to do with the damage to the machine. Both testi-  
 fied as to the condition of the weather and the road. He  
 states he thought there would be cinders underneath the snow,  
 although he says that it had been clearing for about two hours  
 prior to the snow. He further says that he was familiar with  
 this station, the approaches thereto, and the circumstances  
 connected with driving under then existing conditions. The  
 sum and substance of his testimony with respect to the cool-  
 ing machine is, that when he applied his brakes, the front wheels of  
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 states that he did not shift gears as he drove into the sta-  
 tion, but admits that he was driving too fast.  
 It was a question of fact for the jury as to the negli-  
 gence involved. The jury in the trial court had the opportu-  
 nity of hearing the witness testify. It appears that their  
 trucks and motor vehicles had been using the station that

morning. We are of the opinion the issues were fairly presented to the jury and do not discover anything in the record which we think, misled or confused the jury. The judgment is therefore affirmed.

Judgment affirmed.

[illegible]

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GEN. NO. 9756

AGENDA NO. 15

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1942.

314 I.A. 202<sup>2</sup>

W. L. SHERLOCK, EXECUTOR  
OF THE ESTATE OF CORNELIUS  
McGRATH, DECEASED,

APPELLANT,

vs.

LOUISE McGRATH,

APPELLEE.

APPEAL FROM THE CIRCUIT

COURT OF CARROLL COUNTY.

*76 3*  
*1 49*

HUFFMAN, P. J.

This suit grows out of objections filed by appellee to the final report of appellant as executor of the estate of Cornelius McGrath. It appears that appellant qualified as such executor, and letters testamentary issued to him from the county court of Carroll county in June, 1938; that no inventory was ever filed; that upon qualifying as such executor, appellant transferred cash of said estate of approximately \$7,234.92, from various banks in Illinois, to the First National Bank of Monticello, Iowa, where it was placed to the credit of the Standard Credit Corporation; that this corporation was engaged in the loan business; that appellant owned forty-



five percent of the stock of said company; was president thereof, and directed and managed its affairs at a salary of \$3000, per year.

In December, 1940, by virtue of petition filed by appellee in the county court of Carroll county, said court issued its citation directing appellant to appear on December 19, 1940, and to bring into court the assets belonging to the estate, together with an inventory thereof, and an accounting of his transactions in connection therewith from the date of his appointment in June, 1938, to the date of such citation. In response thereto, appellant filed an account in the county court, which must have been in the nature of a final report. However, we are unable to state definitely in this regard as such account does not appear in the abstract or record. Objections were filed to this account by appellee, which are stated to have been sustained by the county court, and an appeal therefrom was taken by appellant to the circuit court of said county.

On a hearing in the circuit court from where this appeal is prosecuted, the court found that the acts of appellant in handling the assets of this estate, and his acts as executor, were wrongful and improper. The court found that he made misapplication of the same by placing them to the credit of his loan company, and not accounting for any interest thereon; that in such manner he used the money for his individual purpose; that such acts amounted to a conversion of the assets to the use of the company of which appellant was a member. The court found that no claims were ever filed against the estate of deceased, and that no indebtedness existed against



Five percent of the stock of said company; was president thereof, and directed and managed its affairs at a salary of \$500 per year.

In December, 1910, by virtue of petition filed by applicant in the county court of Carroll county, said court issued its citation directed to said applicant to appear on January 10, 1910, and to bring into court the assets belonging to the estate, together with an inventory thereof, and an accounting of the transactions in connection therewith from the date of his appointment in June, 1906, to the date of such citation. In response thereto, applicant filed an account in the county court, which might have been in the nature of a final report. However, he was unable to state definitely in this regard as such account does not appear in the minutes on record. Objections were filed to this account by a petitioner, which was stated to have been contained by the county court, and an appeal therefrom was taken by applicant to the circuit court of said county.

On a hearing in the circuit court from where this appeal is prosecuted, the court found that the acts of applicant in handling the assets of said estate, and the acts as executor, were wrongful and improper. The court found that he made misappropriation of the same, and that he was not entitled to his local company, and not accounting for any interest therein; that in such manner he used the money for his individual purposes; that such acts amounted to a conversion of the assets to the use of the company of which applicant was a member.

The court found that no claims were ever filed against said estate or deceased, and that no indebtedness claimed against

said estate except those incident to the last illness and funeral expenses. The court disallowed claim of the appellant for premium on surety bond as such executor following expiration of a year from the issuance of letters. The court reduced his executor's fees from \$805.32, to the sum of \$300.00; sustained objections to certain charges in connection with inheritance tax; charged appellant with interest on the assets used by his loan company at the rate of 2%, which amounted to the sum of \$330.56, and charged him with 10% interest on the assets handled by him after a period of two years from date of his appointment, which amounted to \$609.57. The items disallowed, together with interest, and the statutory penalty of 10% (Ch. 3, sec. 462, 1941 Ill. St.), totaled \$1653.90. Appellant has appealed from the above holding of the circuit court, and appellee has filed her cross-appeal, objecting to the allowance of the executor's fees in the sum of \$300.00, and to the rate of interest on the funds as fixed at 2%, urging such rate should have been 5%.

The only thing this court finds in the abstract is the trial court's findings of fact, conclusions of law, and judgment, together with his written remarks; testimony of appellant, who was called as an adverse witness under section 60 of the Practice act; testimony of an attorney with respect to what the customary fee in that county was for executors or administrators in similar estates; and testimony of appellee to the effect that she had importuned appellant at divers times to close the estate. Such facts as are set out from the finding of the trial court, are supported by the testimony of appellant. We find nothing in his testimony that speaks

said estate except those incident to the last illness and funeral expenses. The court disallowed claim of the appellant for premium on surety bond as such executor following expiration of a year from the issuance of letters. The court reduced his executor's fees from \$303.35 to the sum of \$300.00; sustained objections to certain charges in connection with inheritance tax; charged appellant with interest on the assets used by his loan company at the rate of 2%, which amounted to the sum of \$330.56, and charged him with 10% interest on the assets handled by him after a period of two years from date of his appointment, which amounted to \$609.57. The fees disallowed, together with interest, and the statutory penalty of 10% (G.L. c. 482, § 144 (1), 2d ed.) totaled \$1653.90. Appellant has appealed from the above holding of the circuit court, and appellee has filed her cross-appeal, objecting to the allowance of the executor's fees in the sum of \$300.00, and to the rate of interest on the funds as fixed at 2%, urging such rate should have been 5%.

The only thing this court finds in the abstract is the trial court's findings of fact, conclusions of law, and judgment, together with its written remarks; testimony of appellant, who was called as an adverse witness under section 60 of the practice act; testimony of an attorney who appeared for what the court says in that county was for executor or administrator in similar estates; and testimony of appellee to the effect that she had informed appellant at diverse times to close the estate. Such facts as are set out from the finding of the trial court, are supported by the testimony of appellant. We find nothing in his testimony that speaks



in his behalf. The trial court had the parties before him and, no doubt, with much information not appearing in the limited record. This court is not disposed to disturb the judgment as rendered. The judgment is therefore affirmed.

Judgment affirmed.

Dove, J.

In my opinion appellant was not entitled to any fees for his services as executor and should have been charged with interest at the rate of 5% upon the money of the estate which he used in his loan company and as insisted by appellee upon her cross-appeal. In all other respects I concur in the foregoing opinion.

in his behalf. The trial court had the parties before him and, no doubt, with much information not appearing in the limited record. This court is not disposed to disturb the judgment as rendered. The judgment is therefore affirmed.

Judgment affirmed.

Dove, J.

In my opinion appellant was not entitled to any fees for his services as executor and should have been charged with interest at the rate of 5% upon the money of the estate which he used in his loan company and as indicated by appellee upon her cross appeal. In all other respects I concur in the foregoing opinion.





314 I.A. 203

APPEAL NO. 24

GEN. NO. 9771

IN THE APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1942.

HERSCOA CHRISTENSEN,  
APPELLANT,  
vs.  
ELMER SCOGGIN, doing business  
as TWIN CITY GAS COMPANY, ET AL.,  
APPELLEES.

APPEAL FROM THE  
CIRCUIT COURT OF  
DAKE COUNTY.

HURTAN, P. J.  
On the night of April 27, 1941, appellee, William  
Thomasson, Jr., was driving a car south on Hickory  
street in the city of Hannigan. Appellee, Frank A.  
Dickson, was riding with Thomasson. James Davis was  
driving a car west on Julian street. These two cars  
collided at the intersection of Hickory and Julian  
streets. The car being driven by Davis, after the im-  
pact, travelled a distance of approximately sixty-five  
feet when it went over the curb and struck the house of  
appellee, damaging same.  
Appellant brought suit against the above named  
parties in Justice of the Peace Court, where she obtain-  
ed judgment against them for \$200.00. There, the driver

of the car that struck appellant's residence, took no appeal from the above judgment. Thommesson and Dickson appealed therefrom to the Circuit Court of Lake county. Trial in that court, before a jury, resulted in a verdict of not guilty as to said defendant-appellees.

Appellant, plaintiff-below, made motion for a directed verdict against the defendants at the close of all the evidence. The court reserved ruling thereon until after verdict. Following verdict, the plaintiff-appellant filed motion for judgment notwithstanding the verdict. This motion and motion for directed verdict were denied by the court, and judgment rendered on the verdict for the defendant-appellees. Appellant has prosecuted this appeal from such judgment, urging as her ground for reversal, the refusal of the trial court to grant her motion for judgment notwithstanding the verdict and rendering judgment thereon.

Appellant testified that she heard a loud noise and upon investigating same, found the taxicab driven by Davis against the north wall of her house. Thommesson was called as an adverse witness. He states that he was proceeding south on Hickory street at a speed of approximately twenty to twenty-five miles per hour and with his headlights burning; that when he was in the center of the intersection of the two streets, the taxicab being driven by Davis, and travelling at a speed from forty to forty-five miles per hour, collided with his car, continued on up the street until it struck appellant's house. He says

of the car that struck appellant's residence, took no appeal from the above judgment. Thompson and Dickson appealed therefrom to the Circuit Court of Lake county. Trial in that court, before a jury, resulted in a verdict of not guilty as to said defendant-appellee.

Appellant, plaintiff-below, made motion for a directed verdict against the defendants at the close of all the evidence. The court reserved ruling thereon until after verdict. Following verdict, the plaintiff-appellant filed motion for judgment notwithstanding the verdict. This motion and motion for directed verdict were denied by the court, and judgment rendered on the verdict for the defendant-appellee. Appellant has prosecuted this appeal from such judgment, urging as her ground for reversal, the refusal of the trial court to grant her motion for judgment notwithstanding the verdict and rendering judgment thereon.

Appellant testified that she heard a loud noise and upon investigating same, found the taxicab driven by Davis against the north wall of her house. Thompson proceeded south on Hickory street at a speed of approximately twenty to twenty-five miles per hour and with his headlights burning, that when he was in the center of the intersection of the two streets, the taxicab being driven by Davis, and travelling at a speed from forty to forty-five miles per hour, collided with his car, continued on up the street until it struck appellant's house. He says



that he did not see the taxicab until it was upon him. This constituted the evidence on behalf of appellant.

Thommesson testified in his own behalf, in substance the same as when called as an adverse witness under Section 60. He further states that immediately after the accident, he went up to the taxicab where the driver thereof stated in explanation of the collision that he did not have any brakes. The testimony of Dickson, and another passenger of the Thommesson car, tends to corroborate the testimony of Thommesson. The question of negligence of the parties in this case was a proper question for the jury and therefore the court did not err in denying appellant's motions. The judgment is affirmed.

Judgment affirmed.

that he did not see the accident until it was over him.  
This contradicted the evidence in detail of witnesses.  
The witness testified in his own behalf, in substance  
the same as was called as an adverse witness under sec-  
tion 60. He further stated that immediately after the  
accident, he went up to the railroad where the driver  
thereof stated in explanation of the collision that he  
did not have any brakes. The testimony of witness, and  
another passenger of the locomotive car, tends to corroborate  
the testimony of the witness. The question of negligence  
of the parties in this case was a proper question for the  
jury and therefore the court did not set aside the appeal-  
ant's motion. The judgment is affirmed.  
Judgment affirmed.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

314 I.A. 203<sup>2</sup>

February Term, 1942

J. ERNEST BROOK, as Executor of  
the Estate of GEORGE S. WEDGE,  
deceased, and as Executor of the  
Estate of AMY M. WEDGE, deceased,

Appellant

-vs-

WILLIAM A. ROSING,

Appellee

APPEAL FROM

CIRCUIT COURT

OF KANE COUNTY.

DOVE, J.:

George S. Wedge died August 1, 1936. For upwards of fifteen years he and William A. Rosing, appellee, had been partners in the business of selling and distributing gasoline, oils and products connected therewith. The business was conducted as the Antioch Oil Company. After the death of George S. Wedge, appellant, as Executor of his estate, and Amy M. Wedge, surviving widow, instituted suit in the circuit court of Kane County against appellee as surviving partner, for a partnership accounting. The widow died during the pendency of the action, and appellant, as executor of her estate, was substituted in her stead.

During the time Wedge and Rosing were associated in business together they acquired various tracts of real estate, some of them in the course of business, and others as a speculation. They had no written agreement or articles of co-partnership, either as to the gasoline and oil business or as to any of their real estate dealings. A stipulation



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

314 A. 208

County Term, 1936

APPEAL FROM  
CIRCUIT COURT  
OF KANE COUNTY.

U. SHERMAN WOOD, as Executor of  
the Estate of GEORGE W. WOOD,  
Appellant, and as Executor of the  
Estate of ALICE W. WOOD, Respondent,

Appellant

WILLIAM A. ROSS, JR.,

Respondent

COVE, J. J.

On June 2, 1936, George W. Wood died. His wife, Alice, died on June 1, 1936. The decedents of this case were

he and William A. Ross, Jr., who, together, had been partners in the business

of selling and distributing gasoline, oil and products connected

therewith. The business was conducted as the Kankakee Oil Company. After

the death of George W. Wood, appellant, as Executor of his estate, and

Alice W. Wood, surviving widow, instituted suit in the Circuit Court of

Kane County against appellee as surviving partner, for a partnership

account. The wife died during the pendency of the action, and ap-

pellant, as executor of her estate, was substituted in her stead.

During the time Wood and Ross were associated in business to-

gether they acquired various tracts of real estate, some of them in the

course of business, and others as a speculation. They had no written

agreement or articles of co-partnership, either as to the gasoline and

oil business or as to any of their real estate dealings. A stipulation

was filed in the cause disposing of all matters in dispute except a transaction in relation to 190 acres known as the Druce farm, which appellant claims was a direct transaction of the Antioch Oil Company partnership, and that he is entitled to reimbursement for one-half of the initial payment of \$15,000.00 made by George S. Wedge on the purchase price. Appellee claims the transaction was not that of the Antioch Oil Company partnership, but was a separate, independent matter in which, after Wedge had contracted for the farm individually, he, Rosing, was let into the transaction under an agreement that when the farm was sold, Wedge was to first take his \$15,000.00 out of the proceeds, and the profits, if any, were to be equally divided between them. The special master to whom the cause was referred filed a report finding in favor of the contentions of appellee. Exceptions to the report were overruled, a decree in accordance with the master's findings was entered, and this appeal followed.

The purchase price of the farm was \$47,500.00, of which Wedge paid \$15,000.00. When the deal was finally closed on March 1, 1927, the title was conveyed by Druce to George S. Wedge and William A. Rosing, who executed a promissory note, and a trust deed, to secure the payment of the remainder of the purchase price on or before five years thereafter. Interest on the mortgage of \$1950.00 per annum and the taxes of \$300.00 to \$325.00 each year, aggregating approximately \$18,000.00 to \$19,000.00, were paid by checks of the Antioch Oil Company. On two occasions, the last one in 1936, the semi-annual interest installment was paid by Rosing. He testified the company funds were low when he made the last payment and "Wedge would not pay any more interest, he quit;" that there were no distributions of cash in 1935 and 1936, because they had installed a new station at Fox Lake, which, beside paying interest on the Druce farm, took more than they made in profits.

was filed in the court disposing of all matters in dispute except  
 a question in relation to the facts known as the "Baker Case",  
 which question of fact was a direct transaction of the kind at  
 issue in the present case, and that he is entitled to reimbursement for  
 one-half of the initial payment of \$15,000.00 made by George A. Baker  
 on the purchase price. The fact of the transaction was not that  
 of the United Oil Company, but was a private, individual  
 one; that in 1923, the Baker had contacted for the first time  
 with the United Oil Company, was put into the transaction under an agreement  
 that when the first sale was made, there was to be paid him \$15,000.00  
 out of the proceeds, and the proceeds, it was to be equally  
 divided between them. The special matter to which the case was re-  
 turned filed a report finding in favor of the contention of the Baker.  
 The findings in the report were as follows: a decree in accordance with  
 the report's findings was entered, and this appeal followed.  
 The purchase price of the land was \$47,000.00, of which Baker  
 paid \$15,000.00. The Baker had finally closed on March 1, 1923,  
 the title was conveyed by Deeds to George A. Baker and William A.  
 Baker, who executed a promissory note, and a trust deed, to secure  
 the payment of the remainder of the purchase price of the land. The  
 first payment on the mortgage of \$15,000.00 was made on  
 the 1st of 1924. The second payment of \$15,000.00 was made on  
 the 1st of 1925, and the third payment of \$15,000.00 was made on  
 the 1st of 1926. The first two payments of \$15,000.00 each were  
 On two occasions, the first one in 1923, the second annual interest payment  
 sent the said William A. Baker. He testified the company funds were for the  
 he made the first payment, and "he would not pay any more interest, he  
 said; that there were no distributions of cash in 1925 and 1926, because  
 they had loaned a new sum of money to the Baker. When the Baker paid interest  
 on the loan, he took more than they had as profit.



The inventory filed in the probate court by appellee as surviving partner, lists the Druce farm, as encumbered by the trust deed mentioned. The estimated value of the premises is placed at \$14,250.00, with no net value to the estate. Some time thereafter, in 1937, Druce filed a suit to foreclose the trust deed. The matter was compromised by a reconveyance of the farm to Druce and a cash payment of \$7000.00, of which the estate of George S. Wedge paid one-half, and Rosing paid the other half. The instant suit was filed about one month later.

Druce testified the farm was sold to George S. Wedge and William A. Rosing. T.J. Stahl, a real estate agent, testified, in substance, that he represented Druce in the sale of the farm; that on August 28, 1926, he made the sale to Wedge. He referred to his sales sheet for that month showing the transaction. He further testified that at the time of such sale he dealt only with Wedge; that thereafter and before the sale was closed on March 1, 1927, he talked with Wedge at Antioch in regard to the closing; that Wedge told him he was going to close up soon and that Rosing was going into the deal from that time on; that he (Wedge) was buying the property, but Rosing was going to be in the deal from then on as to any earnings; that Wedge told him he was putting in the down payment of \$15,000.00, and did in fact put it in; and that Wedge further said that in case there was a sale he was to get his money first and then Rosing was to be in on the deal in all the profits.

So far as the abstract discloses, Druce's testimony that the farm was sold to Wedge and Rosing may have been based solely upon the fact that when the transaction was finally closed, the deed was made to both of them. Neither he nor anybody else testified to any fact that contradicts or tends to impeach the testimony of Stahl. It is not inherently improbable, and the court could not, without committing error, reject it. (*Mammina v. Homeland Insurance Co.*, 371 Ill. 555.)

The inventory filed in the probate court by special administrator  
 partner, lists the Price farm, as encompassed by the trust deed, as  
 ed. The estimated value of the premises is placed at \$14,250.00, with  
 no net value to the estate. Some time thereafter, in 1927, James H. Price  
 a suit to foreclose the trust deed. The matter was compromised by a  
 reconveyance of the farm to Price and a cash payment of \$7,000.00, of  
 which the estate of George B. Price paid one-half, and Hosing paid the  
 other half. The instant suit was filed about one month later.  
 Price testified the farm was sold to George B. Price and Hosing.  
 Hosing, T. B. Stahl, a real estate agent, testified, in substance, that  
 he represented Price in the sale of the farm; that on August 23, 1926,  
 he made the sale to Hosing. He referred to his sales agent for that month  
 showing the transaction. He further testified that at the time of such  
 sale he dealt only with Hosing; that thereafter and before the sale was  
 closed on March 1, 1927, he talked with Hosing at Antioch in regard to  
 the closing; that Hosing told him he was going to close up soon and that  
 Hosing was going into the deal from that time on; that he (Hosing) was  
 buying the property, but Hosing was going to be in the deal from then on  
 as to any earnings; that Hosing told him he was putting in the down payment  
 of \$15,000.00, and also in fact put it in; and that Hosing further said  
 that in case there was a sale he was to get his money first and then  
 Hosing was to be in on the deal in all the profits.  
 So far as the abstract discloses, Price's testimony that the farm  
 was sold to Hosing and Hosing may have been based solely upon the fact  
 that when the transaction was finally closed, the deed was made to both  
 of them. Neither he nor anybody else testified to any fact that contr-  
 dict or tends to impeach the testimony of Stahl. It is not immaterial  
 ly improbable, and the court could not, without committing error, reject  
 it. (Hanning v. Hanning, 100 So. 2d 111, 112.)

Wedge and Rosing owned a lot back of the First National Bank in Antioch and a farm known as the Nelson farm. During Wedge's lifetime appellee traded his half interest in the lot to Wedge for Wedge's half interest in the Nelson farm and appropriate deeds were executed. Rosing testified that none of the three transactions as to the Druce farm, the lot back of the bank, or the Nelson farm were operated directly in connection with the oil company business; that they had no stations on them, and they did not use them in any way in connection with the business; that an eighty acre tract in Wisconsin, about two miles from Antioch, and known as the Paschen place, was deeded directly to the witness in satisfaction of a debt to the oil company, and the title was still in his name; that the title to another one acre tract known as the New Munster property with a road house and gasoline station on it was in his name; that the interest in the oil company was taken in payment or part payment of an account, and the oil company has an equity in it of about \$900.00; and that the witness bought a mortgage on it to protect their interest.

Upon being recalled, Rosing testified, over objection, that there were no other partnerships in real estate like the one in the Druce farm; that he did not have anything at all to do with the purchase of the Druce farm at the time it was purchased; and that something was said to him by Wedge after August, 1926, and <sup>before</sup> the date of the note and trust deed, as to the basis on which he might become a partner in the Druce farm. No attempt was made to show what Wedge said to him. If, as claimed by appellant, this testimony was incompetent, that fact does not constitute reversible error. The testimony of Stahl was sufficient to show the character of the transaction, and it is presumed the chancellor did not consider any incompetent testimony admitted by the master.





When the competent testimony is summarized it shows that Wedge and appellee owned various pieces of real estate together at different times. Some of them, including the tract where their business was located, were owned and operated in connection with the Antioch Oil Company partnership. Other tracts which they owned, and in connection with which they engaged in business activities together, had no connection with that business. The testimony falls far short of showing that the Druce farm belonged to that partnership as an asset of the business. While appellee inventoried it in the probate court as a partnership asset, it is apparent that his interpretation of the meaning of the term "partnership" included everything that he and Wedge owned and operated together. In his testimony he repeatedly spoke of their owning tracts as partners, which he testified had no connection with the Antioch Oil Company, and he admits a partnership in the Druce farm under a like state of facts. The master and the chancellor denominated it as a joint venture, but whether it was the one or the other we regard as of no consequence. The test, by the issue made by the pleadings, is whether its ownership was directly connected with the Antioch Oil Company partnership. A significant circumstance in this case is that when the \$7000.00 was paid Druce, the record does not show that appellant made any claim such as he now makes, but contributed one-half the amount. If he felt that appellee was liable for half of the \$15,000.00, it is not suggested why he did not call upon him to pay it at that time, and save the estate from paying the \$3500.00 which he paid as executor.

Here, as in *Nehrkorn v. Tissier*, 352 Ill. 181, there is no showing that the Druce farm was purchased with partnership money or for partnership purposes of the Antioch Oil Company, or that it was entered on its books as the property of that partnership, or that there was a contract or understanding between the partners in that business that the farm was

Then the competent testimony is presented in such a way  
and appellee owned various pieces of real estate together with differ-  
ent times. Some of them, including the tract where their business  
was located, were owned and operated in connection with the Antioch  
Oil Company partnership. Other tracts which they owned, and in con-  
nection with which they engaged in business activities together, had  
no connection with that business. The testimony falls far short of  
showing that the Bruce farm belonged to that partnership as an asset  
of the business. While appellee averred that it in the probable event  
as a partnership asset, it is apparent that his interpretation of the  
meaning of the term "partnership" included everything that he had and had  
owned and operated together. In his testimony he repeatedly spoke of  
their owning tracts as partners, which he testified had no connection  
with the Antioch Oil Company, and he admits a partnership in the Bruce  
farm under a like state of facts. The matter and the character of the  
nomination it as a joint venture, but whether it was one or the other  
we regard as of no consequence. The fact, in the former case, of the  
pleadings, is whether the property was directly connected with the  
Antioch Oil Company partnership. A significant circumstance in this  
case is that when the \$700.00 was paid down, the record does not show  
that appellant made any claim upon it as he now makes, but contributed one-  
half the amount. If he felt that appellee was liable for half of the  
\$15,000.00, it is not suggested why he did not call upon him to pay it  
at that time, and have the estate then paying the \$3000.00 which he paid  
as executor.

Here, as in *Webster v. Webster*, 225 Ill. 181, there is no showing  
that the Bruce farm was purchased with partnership money or for partner-  
ship purposes of the Antioch Oil Company, or that it was entered on its  
books as the property of that partnership, or that there was a contract  
or understanding between the partners in that business that the farm was



the property of that partnership. In that case the court held that in the absence of any one or more of these controlling factors to show that the property was partnership property, a finding that it was such could not be sustained. The opinion cites Robinson Bank v. Miller, 153 Ill. 244, and Alkire v. Kahle, 123 id. 496.

The fact that the interest and taxes were paid for a number of years out of the Antioch Oil Company funds we do not regard as showing the farm was an asset of that business. Each partner had an equal share in the business. Rosing testified he never at any time that he knew of withdrew from the oil company business any money when a like amount was not paid to Wedge. The mechanics of each one withdrawing from the business an amount equal to half the interest or taxes and then individually applying the money to the payment thereof, would have no difference in effect than paying the amount in one sum from the oil company funds.

In Blakeslee v. Blakeslee, 265 Ill. 48, it was sought to establish the real estate involved was partnership property. One of the partners owned the property. At the time the partnership was entered into the other partner agreed to purchase a one-half interest in the real estate and the articles of agreement so provided. The real estate was actually used by the partnership in conducting its business of a general warehouse and storage. The partnership books showed the real estate was treated as a partnership asset. Yet, notwithstanding these facts the court held the real estate was not a part of the partnership assets.

In Robinson Bank v. Miller, supra, the court said:

"When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation. (Parsons on Part. sec. 267.) And where it is sought to show a conversion of land into personalty by agreement of the partners, such agreement must be clear and explicit. (17 Am. & Eng. Enc. of Law, page 954, and cases cited.)"

the property of that partnership. In that case the court held that in the absence of any one or more of these essential factors to show that the property was partnership property, a finding that it was such could not be sustained. The opinion of the Honorable Ben N. Miller, 121 Ill. 2d, and Alkins v. Kahle, 121 Ill. 2d.

The fact that the interest and taxes were paid for a number of years out of the Atlantic Oil Company funds as is not regarded as showing the firm was an asset of that business. Each partner had an equal share in the business. Having established as a matter of fact that he had no withdrawal from the oil company business any money when a like amount was not paid to the partner. The partnership of each and withdrawing from the business an amount equal to half the interest on taxes and then individually applying the money to the payment of taxes, would have no difference in effect than paying the amount in and for the oil company funds. In *Winters v. Winters*, 282 Ill. 48, it was sought to establish

the real estate involved was partnership property. One of the partners owned the property. At the time the partnership was entered into the other partner agreed to purchase a one-half interest in the real estate and the title of the property was conveyed. The real estate was not used by the partnership in conducting the business of a general warehouse and storage. The partnership did not own the real estate and was treated as a partnership asset. Yet, notwithstanding these facts the court held the real estate was not a part of the partnership assets.

In *Winters v. Winters*, supra, the court said:  
"When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as to show that each partner equally participated and contributed to the purchase of the land and that the title was conveyed to the partnership. (See *Winters v. Winters*, 282 Ill. 48.) And where it is sought to show a conversion of land into partnership property by agreement of the partners, such agreement must be clear and explicit. (See *Winters v. Winters*, 282 Ill. 48, and cases cited."

The mere fact that Wedge and Rosing were partners in the Antioch Oil Company did not make real estate purchased by one of them partnership property of that partnership. To make it so it must have been purchased with the partnership funds for the partnership purposes, or at least there must have been one of these elements present. (Thanos v. Thanos, 313 Ill. 499, citing the Blakeslee case, the Robinson Bank case and the Alkire case, supra.)

The fact that the grantees in the deed were not mentioned as partners therein, is a factor indicating the real estate was not to be considered as a transaction of the Antioch Oil Company. (Nehrkorn v. Tissier, supra; Robinson Bank v. Miller, supra.)

The evidence not only fails to sustain the contentions of appellant, but fully justifies the findings of the master and the decree of the chancellor. The decree is accordingly affirmed.

Decree affirmed.





314 I.A. 204<sup>1</sup>

Gen. No. 9643.

Agenda No. 1.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

JOHN JOHNSON, Administrator )  
of the Estate of Arthur John- )  
son, Deceased, )  
Appellant, )  
vs. )  
EDWARD MUELLER, )  
Appellee. )

Appeal from  
Circuit Court,  
Will County.

WOLFE,-- J.

John Johnson, as Administrator of the Estate of Arthur Johnson, deceased, started a suit in the Circuit Court of Will County, against Edward Mueller in which he claimed damages for the wrongful death of Arthur Johnson, the plaintiff's intestate. The complaint consisted of one count and charged the defendant with negligence in one or more of the following acts. First, the violation of the State Statute by parking his car on a two-lane paved State Highway with no tail light burning. Second, with common law negligence in his failure

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IN THE

APPELLATE COURT OF THE STATE OF NEW YORK

IN SENATE

RECORDED IN BOOK 1, PAGE 1.

APPELLATE COURT  
OF THE STATE OF NEW YORK  
IN SENATE

JOHN JOHNSON, Administrator  
of the Estate of Arthur Johnson,  
Deceased,

Appellant,

vs.

EDWARD HULLER,

Appellee.

WOLFE, -- 1.

John Johnson, as Administrator of the Estate of Arthur Johnson, deceased, started a suit in the Circuit Court of Will County, against Edward Huller in which he claimed damages for the wrongful death of Arthur Johnson, the plaintiff's intestate. The complaint consisted of one count and charged the defendant with negligence in one or more of the following ways: First, the violation of a statute forbidding the parking of a car on a two-lane street; second, with failure to keep the car in a safe condition; third, with common law negligence in not stopping the car when it was necessary to do so.



2.

to signal that his car was so parked; and third, the negligent manner of operating and the controlling of his car. It is then alleged, that as a direct and proximate result of such negligence, that the car in which the plaintiff's intestate was riding, collided with the car of the defendant, and that the plaintiff's intestate sustained serious injuries to his head, and as a direct and proximate result of such injuries, he became insane and while in a state of insanity, and as a proximate result of said collision and injuries, the plaintiff's intestate committed suicide. The complaint also alleged that just prior to, and at the time of the collision in question, the plaintiff's intestate was in the exercise of due and ordinary care for his own safety.

The defendant, Edward Mueller, filed his answer in which he denied all the material allegations of the complaint. The case was submitted to a jury, who found the issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled by the trial court. Judgment was entered on the verdict in favor of the defendant. It is from this judgment that the appeal is prosecuted.

The appellant, in his argument says: "The reversible errors which we believe the record to contain, all pertain to that phase of the case dealing with the nature (i.e., cause) of the decedent's insanity and the actuating force which resulted in his suicide. Because

to signal that his car was so parked; and that, the negligent manner of operating and the controlling of his car. It is then alleged, that as a direct and proximate result of such negligence, that the car in which the plaintiff's intestate was riding, collided with the car of the defendant, and that the plaintiff's intestate sustained serious injuries to his head, and as a direct and proximate result of such injuries, he became insane and while in a state of insanity, and as a proximate result of said collision and injuries, the plaintiff's intestate committed suicide. The court has also ruled that just prior to, and at the time of the collision in question, the plaintiff's intestate was in the exercise of his ordinary duty for his own safety.

The defendant, Edward Mueller, filed his answer to which he denied all the material allegations of the complaint. The case was submitted to a jury, who found the issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled by the trial court. Judgment was entered on the verdict in favor of the defendant. It is in this judgment that the appeal is prosecuted. The appellant, in his argument says: "The reversible errors which we believe are record in this case, all pertain to that phase of the case dealing with the matter (i.e., cause) of the decedent's insanity and the accounting for the result in his suicide. Because

3.

of this we shall devote little space to the question of liability insofar as it may rest on the facts incident to the collision between the automobiles. It should be sufficient to point out that this Court, in an opinion by Justice Wolfe, affirming the judgment rendered in the case in which Charles Johnson, the father, sued for injuries received in the same accident, said: We have reviewed the evidence and it is our opinion that it sustains the contention of the appellee that at the time of the collision of the cars there was no tail light burning on the appellant's car, and the snow on the shoulder of the road was not deep enough to prevent the appellant from driving his car off of the slab onto the dirt shoulder of the road." (Johnson v. Mueller, Gen. No. 8632, Abs. Dec. 273, Ill. App.637.)

The appellant has omitted a very pertinent part of that paragraph which precedes the part that he quotes. It will be recalled that in the former case the plaintiff was successful in his suit, and the jury found the issues in favor of the plaintiff and in that connection the language quoted by the appellant was used, but is preceded by the following: "These are questions of fact to be decided by the jury, and unless this Court can say that the verdict is manifestly against the weight of the evidence, we would not be justified in reversing the case for the reason that this Court on a review of the evidence, might reach a different conclusion from that of the trial court and jury."



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in an opinion by Justice Wolfe, affirming the judgment rendered in the case in which Charles Johnson, the father, sued for injuries re-

ceived in the same accident, said: We have reviewed the evidence and it is our opinion that it sustains the contention of the appellee that at the time of the collision of the cars there was no tail light burning on the appellant's car, and the snow on the shoulder of the road was not deep enough to prevent the appellant from driving his car off of the slab onto the left shoulder of the road." (Johnson

v. Welles, 200 No. 8032, App. Div. 2, 114 App. Div. 2, 114 App. Div. 2.)

The appellant has omitted a very pertinent part of the paragraph which precedes the part that he quotes. It will be recalled that in the former case the plaintiff was successful in his suit, and

the jury found the issues in favor of the plaintiff and in that connection the language quoted by the appellant was used, but it preceded by the following: "These are questions of fact to be decided by the jury, and unless this Court can say that the verdict is manifestly against the weight of the evidence, we would not be justified in reversing the case for the reason that this Court on a review of the evidence, might reach a different conclusion from that

of the trial court and jury."

In the former case Francis Johnson, a son of the plaintiff, testified that he was riding in the car with his father and brother and he did not see any tail light on the Mueller car, and that there wasn't any snow on the shoulder of the road to amount to anything.

John Johnson, a son of Charles Johnson, testified that he went down to the scene of the accident the next day, and there was only about two inches of snow on the shoulder of the pavement.

Mike Walsh testified that he was following the Johnson car and bumped into it slightly after the accident; that he could not say whether or not a tail light was on the Mueller car at the time, and that there might have been some snow on the shoulder of the road.

Charles Johnson, the plaintiff, testified that he was riding in the front seat of the car looking straight ahead and he saw no tail light on Mueller's car.

Mrs. Will Murphy testified that she was riding in another car and approached the Mueller car and saw that the tail light of the car was burning and saw Mr. Mueller at the car, putting a blanket over the radiator; that they drove on past the car, and in her estimation, there was about two feet of snow on the shoulder of the road.

Mrs. Mollie Lawlor who was in the same car with Mrs. Murphy testified to practically the same thing. Edward Mueller, the defendant, testified that the tail light of his car was burning before, and at the

in the former case Francis Johnson, a son of the plaintiff, testified that he was riding in the car with his father and brother and he did not see any tail light on the Miller car, and that there wasn't any snow on the shoulder of the road to account for anything.

John Johnson, a son of Charles Johnson, testified that he went down to the scene of the accident the next day, and there was only about two inches of snow on the shoulder of the pavement.

Mike Walsh testified that he was following the Johnson car and bumped into it slightly after the accident; that he could not say whether or not a tail light was on the Miller car at the time, and that there might have been some snow on the shoulder of the road.

Charles Johnson, the plaintiff, testified that he was riding in the front seat of the car looking straight ahead and he saw no tail light on Miller's car.

Mrs. Will Murphy testified that she was riding in another car and approached the Miller car and saw that the tail light of the car was burning and saw Mr. Miller at the car, putting a blanket over the radiator; that they drove on past the car, and in her estimate, there was about two feet of snow on the shoulder of the road.

Mrs. Mollie Lawler who was in the same car with Mrs. Murphy testified to practically the same thing. Edward Miller, the defendant, testified that the tail light of his car was burning before, and at the



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time of the collision, and that the snow on the shoulder of the road at the place where the accident occurred, was between two and three feet deep. This was the testimony on which the jury based their verdict of whether the tail light on the Mueller car was burning, and as to the depth of the snow on the side of the road. The jury evidently believed the witnesses for the plaintiff who said that there was only a small amount of snow on the shoulder of the road, and that Mueller could very easily have driven his car off onto the shoulder and prevented the accident.

In the present case Francis Johnson testified that he was in the car with his father and brother, and that the tail light on Mr. Mueller's car was not burning, and that the snow on the side of the road was slight. Mr. William Glenney was not called at the first trial, but testified at this trial that he remembered going to the scene of the accident, and in his opinion there was about four inches of snow on the shoulder of the pavement. He said his attention had not been called to the amount of snow since the time of the accident in 1930, up until the time he testified, and that he only knew he was going to be a witness a few days before he testified. He did not testify in regard to the tail light.

John Johnson, the present administrator bringing this suit, testified that he was not at the scene of the accident when it occurred, but drove down the next day, and that in his opinion, there was about

them of the collision, and that the car on the shoulder of the road at the place where the accident occurred, was between two and three feet deep. This was the testimony of which the jury heard their verdict of whether the tail light on the latter car was burning, and as to the depth of the snow on the side of the road, the jury evidently believed the witnesses for the plaintiff who said there was only a small amount of snow on the shoulder of the road, and that the latter could very easily have driven the car off into the road, and prevented the accident.

In the present case Francis Johnston testified that he was in the car with the father and brother, and that the tail light on Mr. Mueller's car was not burning, and that the snow on the side of the road was slight. Mr. William H. Jones was not called at the first trial, but testified at this trial that he remembered going to the scene of the accident, and in his opinion there was about four inches of snow on the shoulder of the pavement. He said his estimate was not based on the amount of snow since the time of the accident in 1930, up until the time he testified, and that he only knew he was going to see a witness a few days before he testified. He did not testify in regard to the tail light.

John Johnson, the present administrator of the estate, testified that he was not at the scene of the accident when it occurred, but drove down the next day, and that in his opinion, there was about

three inches of snow on the shoulder of the road. These are the only witnesses that testified for the plaintiff, as to the depth of the snow on the shoulder of the road, or as to whether the tail light of the Mueller car was burning.

On behalf of the defendant, Mr. George Kuhn testified that there had been several hard snows previous to the accident, and that the right of way had been cleaned off, and in his opinion, the snow on the shoulder of the road at and near the place where the accident occurred, was four and maybe five feet deep in places.

Joseph Murphy testified that he had occasion to travel this road frequently and knew its condition on the night of the accident, and that there had been several snows previous, and that in his opinion, the snow was at least a foot and a half to three feet deep, and it covered both shoulders of the road.

Harold Barton testified that he lived close to the scene of the accident; that he knew the condition of the roads generally in that community, and that on the night of the accident, at the place in question, in his opinion the snow was from a foot and a half to three feet deep; that there had been several hard snows previous to the accident.

Mr. Edward Pester testified that he drove down to the scene of the accident the next day, and observed the condition of the shoulders with reference to the snow, and in his opinion that



three inches of snow on the shoulder of the road. These are the only witnesses that testified for the plaintiff, as to the depth of the snow on the shoulder of the road, or as to whether the tail light of the Mueller car was burning.

On behalf of the defendant, Mr. George Kuhn testified that there had been several hard snows previous to the accident, and that the right of way had been cleaned off, and in his opinion, the snow on the shoulder of the road at and near the place where the accident occurred, was four and maybe five feet deep in places.

Joseph Murphy testified that he had occasion to travel this road frequently and knew its condition on the night of the accident, and that there had been several snows previous, and that in his opinion, the snow was at least a foot and a half to three feet deep, and it covered both shoulders of the road.

Harold Barton testified that he lived close to the scene of the accident; that he knew the condition of the roads, generally in that community, and that on the night of the accident, at the place in question, in his opinion the snow was from a foot and a half to three feet deep; that there had been several hard snows previous to the accident.

Mr. Edward Foster testified that he drove down to the scene of the accident the next day, and observed the condition of the shoulders with reference to the snow, and in his opinion that

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the snow was from two to four feet deep.

Mr. Edward Mueller testified that in his opinion the snow on the shoulder at the scene of the accident was three feet deep, and the tail light of his car was burning.

Mrs. Leo Murphy testified that she and Mrs. Mollie Lawlor were coming down the road; that she was driving her car on the night of the accident in question; that as she approached the car of the defendant, she noticed a red light, which was the tail light of the defendant's car, and it was burning; that she pulled her car to the left of his car, stopped about a minute, and saw that it was Mr. Edward Mueller's car; that he was blanketting the radiator; that the snow-ploughs had gone through and pushed the snow from the highway onto the shoulder, and in her opinion it varied from two to three feet in depth.

Mrs. Mollie Lawlor testified that she was with Mrs. Leo Murphy, as she drove down the road and approached the car of Edward Mueller; that the first thing they noticed was the red tail light burning on Mueller's car; that Mrs. Murphy drove her car to the left around the Mueller car; that they noticed Mueller standing by the side of his car, and that the radiator was steaming; that they had had severe snowstorms prior to the accident, and in her opinion, the snow on the shoulder of the highway was practically three feet deep.

the snow was from two to four feet deep.

Mr. Edward Mueller testified that in his opinion the

snow on the shoulder of the road was from three feet

deep, and the tail light of the car was burning.

Mrs. Lee Murphy testified that she and Mrs. Belle Lawton

were coming down the road, that she was driving her car on the right

of the accident in question; that as she approached the car of the

defendant, she noticed a red light, which was the tail light of the

defendant's car, and it was burning; that she pulled her car to the

left of his car, stopped about a minute, and saw that it was Mr.

Edward Mueller's car; that it was discharging the radiator; that she

saw-pictures had gone through and passed the car from the right;

onto the shoulder, and in her opinion it would take two to three

feet in depth.

Mrs. Belle Lawton testified that she was with Mrs. Lee

Murphy, as she drove down the road and approached the car of Edward

Mueller; that the first thing they noticed was the red tail light

burning on Mueller's car; that Mrs. Murphy asked her car to the left

around the Mueller car; that they noticed the light shining by the

side of his car, and that the radiator was steaming, that they had

had severe snow-storms prior to the accident, and in her opinion, the

snow on the shoulder of the highway was probably three feet deep.



8.

It is upon this evidence that the jury, in the present case, based their verdict and evidently believed that the tail light of the defendant, Mueller's car was burning, and that the snow on the shoulder of the road next to the pavement was at least two to four feet deep.

That the defendant's car was steaming and his vision obscured by the overheating of his engine, is not disputed in this case. The only disputed questions of fact, as to how the accident occurred, is whether the defendant had the tail light on his car burning at the time of the accident, and whether the depth of the snow on the shoulders of the highway was deep enough that it was impractical for him to drive his car off of the paved part of the highway onto the shoulder of the road. These were questions of facts for the jury to decide. They evidently gave more credence to the testimony of the defendant's witnesses than they did to those of the plaintiff. From a review of the evidence, we are clearly of the opinion that the weight of the evidence supports the contention of the defendant, that the snow was from eighteen inches to three feet deep on the side of the pavement, and that the tail light of his car was burning.

It is contended that the defendant violated the provision of Section 185 of Chapter 95<sup>1</sup>/<sub>2</sub> of the Illinois Revised Statute. That part of the Statute pertinent to the issues herein, is as follows:  
"Upon any highway outside of a business, resident or suburban district

It is upon this evidence that the jury, in the present case, based their verdict and evidently believed that the tail light of the defendant's car was burning, and that he saw on the shoulder of the road next to the pavement was at least two to four feet deep. That the defendant's car was a sedan and its vision obscured by the overgrowth of his engine, is undisputed in this case. The only disputed questions of fact, as to how the accident occurred, is whether the defendant had the tail light on his car burning at the time of the accident, and whether the depth of the snow on the highway was deep enough that it was impractical for him to drive his car off the paved part of the highway to the shoulder of the road. These were questions of fact for the jury to decide. They evidently gave more credence to the testimony of the defendant's witnesses than they did to those of the plaintiff. From a review of the evidence, we are clearly of the opinion that the weight of the evidence supports the conclusion of the defendant, that the snow was from eighteen inches to three feet deep on the side of the pavement, and that the tail light of his car was burning.

It is contended that the defendant violated the provision of Section 105 of Chapter 227 of the Illinois Revised Statutes, that part of the Statute pertinent to the issues herein, is as follows:

"Upon any highway outside of a city, town or village, no person shall

no person shall stop, park, or leave standing any vehicle, whether attended or unattended upon a paved, or improved, or a main travelled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, etc." When a car is stopped upon a highway, no hard and fast rule can be laid down as to whether it would be practical to drive off onto the shoulder, but each case must be decided upon the evidence as presented, as a question of fact for the jury to determine. Evidently the jury, by their verdict, has determined this question in favor of the defendant.

It is contended by the appellee that the plaintiff's intestate was guilty of contributory negligence, as a matter of law. The appellee was driving his car down a paved highway, and as before stated, stopped on account of his engine overheating and steam escaping from the radiator, and obscuring his vision through the windshield. He stopped upon the highway and it is conceded by everyone that there was snow on the ground. It is shown by a preponderance of the evidence that the tail light of the defendant's car was burning. The evidence is all to the effect that the driver of the car was looking towards the defendant's car, but did not see it in time to avoid a collision, and drove into the back end of the car. The owner of the car in which Arthur Johnson was riding and driving, testified that it was not exactly a clear night, but that he could see well, and his windshield was clear.



no person shall stop, park, or leave standing any vehicle, whether attended or unattended upon a paved, or improved, or a main travelled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, etc." When a car is stopped upon a highway, no hand and foot rule can be laid down as to whether it would be practical to drive off onto the shoulder, but each case must be decided upon the evidence as presented, as a question of fact for the jury to determine. Evidently the jury, by their verdict, has determined this question in favor of the defendant.

It is contended by the appellee that the plaintiff's interstate was guilty of contributory negligence, as a matter of law. The appellee was driving his car down a paved highway, and he claims stated, stopped on account of his engine overheating and steam escaping from the radiator, and occurring his vision through the windshield. He stopped upon the highway and it is conceded by everyone that there was snow on the ground. It is shown by a preponderance of the evidence that the tail light of the defendant's car was burning. The evidence is all to the effect that the driver of the car was looking towards the defendant's car, but did not see it in time to avoid a collision, and drove into the back end of the car. The owner of the car in which Arthur Johnson was riding and driving, testified that it was not exactly a clear night, but that he could see well, and his windshield was clear.

If this is true, whether the defendant's car had a tail light on it or not, it seems that a careful driver would observe this car standing upon a highway with shoulders covered with snow, in time to avoid a collision. Other people travelling in the same direction as the plaintiff and defendant, testified that they saw the car when they were between five and six hundred feet away from it; that they saw the red tail light burning, drove on and pulled out to the side of the car and stopped to see what was the matter, and observed Mr. Mueller holding a laprobe or blanket over the steaming radiator. The jury, on the evidence introduced by both plaintiff and defendant, would be justified and probably did find that the negligence of the plaintiff's intestate contributed to his injuries.

From a review of the evidence in this case, it is our conclusion that if the jury had found the issues in favor of the plaintiff, the verdict could not stand, as it would be against the manifest weight of the evidence. Before the plaintiff could recover, it was necessary to prove that at, and just prior to the accident in question, that the deceased was in the exercise of due and ordinary care for his own safety, and that the defendant was guilty of negligence that was the proximate cause of the injury to the plaintiff's intestate. The jury, by their verdict, have found against the plaintiff, relative to these issues.

It is true, whether the defendant was in a full right of mind or not, it seems that a careful driver would have been able to avoid a collision with another car. It is true to avoid a collision. Other people travelling in the same direction as the plaintiff and defendant, testified that they saw the car when they were between five and six hundred feet away from it; that they saw the red tail light light up; that they saw the car and stopped to see what was the matter, and observed Mr. Walker holding a 1 piece of blanket over the screaming pedestrian. The jury, on the evidence in this case, is not satisfied that the defendant would be justified and probably did find that the negligence of the plaintiff's mistake contributed to the injuries.

From a review of the evidence in this case, it is our conclusion that if the jury had found the facts in favor of the plaintiff, the verdict could not stand, as it would be against the manifest weight of the evidence. Before the plaintiff could recover, it was necessary to prove that at, and just prior to the accident in question, that the deceased was in the exercise of his ordinary care for his own safety, and that the defendant was guilty of negligence that was the proximate cause of the injury to the plaintiff's intestate. The jury, by their verdict, have found against the plaintiff, relative to these issues.



11.

The appellant's main argument is directed to the complained of errors of the trial court in the admission of expert testimony relative to the insanity of plaintiff's intestate. In view of the fact that we have found that the plaintiff failed to maintain his case by a preponderance of the evidence, that plaintiff's intestate was in the exercise of due care for his own safety, and not guilty of negligence that was the proximate cause of his injuries, and that the defendant was guilty of negligence, as charged in his complaint, the injuries that plaintiff's intestate may have received by reason of the collision, becomes immaterial in the case, and for that reason we have not considered the assignment of errors relative to this part of the case.

Complaint is made in regard to the defendant's given instruction No. 11. We do not approve of the language as used therein, but in view of our statement, relative to the evidence, we think this instruction becomes immaterial, as it does not relate to the negligence of the defendant, or to the contributory negligence of the plaintiff, but only as to the injuries sustained by the deceased, and the connection of such injuries with the accident in question.

The Judgment of the Trial Court is hereby affirmed.

Affirmed.

The appellant's main argument is directed to the commission of errors of the trial court in the admission of expert testimony relative to the insanity of plaintiff's intestate. In view of the fact that we have found that the plaintiff failed to maintain this case by a preponderance of the evidence, that plaintiff's intestate was in the exercise of due care for his own safety, and not guilty of negligence that was the proximate cause of his injuries, and that the defendant was guilty of negligence, or charged to his intestate, the injuries that plaintiff's intestate may have received by reason of the collision becomes immaterial in this case, and for that reason we have not considered the assignment of errors relative to this part of the case. Complaint is made in regard to the defendant's given instruction No. 11. We do not approve of the language as used therein but in view of our statement relative to the evidence, we think this instruction becomes immaterial, as it does not relate to the negligence of the defendant, or to the contributory negligence of the plaintiff, but only as to the injuries sustained by the deceased, and the connection of such injuries with the accident in question. The judgment of the Trial Court is hereby affirmed.

affirmed.

Abstract

314 I.A. 204<sup>2</sup>

Gen. No. 9741.

Agenda No. 4.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

ELIZABETH M. JONES,  
(Plaintiff) Appellee,  
vs.  
ILLINOIS IOWA POWER COMPANY,  
a corporation,  
(Defendant) Appellant.

803  
153  
Appeal from  
Circuit Court  
of Peoria County.

WOLFE,-- J.

Elizabeth M. Jones brought suit in the Circuit Court of Peoria County, against the Illinois Iowa Power Company for personal injuries which she alleged she had received while riding as a guest in an automobile owned and driven by Ray Bush, when his car ran into the rear of one of the defendant's passenger buses. The complaint consists of three counts in which it is alleged that the plaintiff was riding as a guest in the Bush car and that the defendant was operating the bus in question, in its business of transporting



Abstract

814 I.A. 204

Grade No. 1

Case No. 1

IN THE  
COURT OF COMMON PLEAS  
OF THE COUNTY OF COLUMBIA  
STATE OF PENNSYLVANIA  
JANUARY TERM, A. D. 1942.

Appeal from  
Circuit Court  
of Columbia County.

WILLIAM H. JONES,  
(Plaintiff) Appellee,  
vs.  
ILLINOIS POWER COMPANY,  
(Defendant) Appellant.

WOLFE, J.

William H. Jones brought suit in the Circuit Court of Columbia County, against the Illinois Power Company for personal injuries which he alleged the had received while riding as a guest in an automobile owned and driven by J. H. Smith, when his car ran into the rear of one of the defendant's passenger buses. The complaint consists of three counts in which it is alleged that the plaintiff was riding as a guest in the first car and that the defendant was operating the bus in question, in the business of transporting

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passengers for hire, and that the plaintiff, at all times, was in the exercise of due and ordinary care for her own safety, and that by reason of the negligence of the defendant, she was injured; that the plaintiff was riding in a northerly direction on Adams Street; that Adams Street intersects Homestead Avenue; that Adams Street runs practically north and south, and Homestead Avenue practically east and west; that the bus made a sudden stop and the car, in which she was riding, crashed into it. The second count alleges that the defendant drove its motor-bus past the intersection of Adams and Homestead Street and negligently made a sudden stop near the center of the intersection, and as a result thereof, the collision occurred. Count 3 alleged that the defendant violated Section 188 Chapter 95<sup>1</sup>/<sub>2</sub> Illinois Revised Statutes, in that the defendant did not stop its bus within twelve inches of the right-hand curb, as required by the statute, and that such negligence caused the collision in which the plaintiff was injured.

The defendant filed its answer in which it admitted the allegations of the complaint with reference to the location of the accident, its ownership and operation of the bus, and its business of transporting passengers for hire at the time and place of the accident, but denied each and every other allegation contained in all of the counts of the complaint. The answer admitted the existence of the sections of the statute set forth in count 3 of the

passenger for hire, and that the plaintiff, at all times, was in the exercise of the ordinary care for her safety, and that by reason of the negligence of the defendant, she was injured; that the plaintiff was riding in a motorless car on a street; that when three motorless cars used Avenue; that when the car was practically north and south, and the plaintiff was proceeding east and west; that the car made a sudden stop and the car in which she was riding crashed into it. The record shows that the defendant drove its motorless car in violation of the laws of the State, and that the defendant was negligent in the operation of the motorless car, and as a result thereof, the collision occurred. Count 3 alleged that the defendant violated section 106 of the Illinois Revised Statutes, in that the defendant did not stop its car within twelve inches of the sidewalk curb, as required by the statute, and that such negligence caused the collision in which the plaintiff was injured.

The defendant after the crash in which he sustained the allegations of the complaint with reference to the location of the accident, the ownership and operation of the car, and the negligence of the defendant, passengers for hire at the time and place of the accident, and denied each and every other allegation contained in any of the counts of the complaint. The prayer requested the existence of the sections of the statute set forth in Count 3 of the



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complaint, but denied that it violated said section of the statute within the intent of the section, and the legislature in the enactment thereof, and denied that such statute applied to the defendant operating as a public utility under the laws of the State of Illinois.

The case was tried before a jury, and at the close of the plaintiff's evidence, the defendant moved the Court to instruct the jury to find the defendant not guilty. This motion was denied. At the close of all of the evidence in the case a similar motion was presented to the Court, and this motion was also denied. The jury returned a verdict finding the defendant guilty and granting the plaintiff damages in the amount of \$1,500.00. The defendant moved for judgment notwithstanding the verdict, which was denied. They then entered a motion for a new trial, which was likewise denied, and judgment was entered in favor of the plaintiff on the verdict. It is from this judgment that the appeal is prosecuted.

The evidence shows that north Adams Street runs approximately north and south and Homestead Avenue runs nearly east and west, and intersects north Adams, and at this intersection the collision in question occurred; that the plaintiff and her husband, Archie W. Jones, were riding in the automobile of Ray Bush, and that Mr. Bush was driving the car. Mrs. Jones was sitting next to Mr. Bush and her husband was at her right, all in the front seat of the automobile; that these three

complaint, but denied that it violated said section of the statute within the intent of the section, and the defendant in the instant case, and denied that such section applied to the defendant operating as a public utility under the laws of the State of Illinois. The case was tried before a jury, and in the course of the

plaintiff's evidence, the defendant moved the Court to instruct the jury to find the defendant not guilty. This motion was denied. At the close of all of the evidence in the case a similar motion was

presented to the Court, and this motion was also denied. The jury returned a verdict finding the defendant guilty and granting the plaintiff damages in the amount of \$1,500.00. The defendant moved for judgment notwithstanding the verdict, which was denied. They then entered a motion for a new trial, which was likewise denied, and judgment was entered in favor of the plaintiff on the verdict. It is from this judgment that the appeal is presented.

The evidence shows that North Adams Street runs approximately north and south and Howard Avenue runs nearly east and west, and intersect at this intersection the collision in question occurred; that the plaintiff and her husband, Frank W. Jones, were riding in the automobile of Ray Jones, and that the husband was the driver. Mrs. Jones was sitting next to Mr. Jones and her husband was at her right, all in the front seat of the automobile; that these three

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people had been together all of the afternoon, and that the accident occurred at 7:30 or 8:00 o'clock in the evening on Easter Sunday April 9, 1939; that the regular route for the bus was north on Adams Street; that the Bush car drove onto Adams Street approximately thirteen blocks south of Homestead Avenue, and followed directly behind the bus at approximately eighteen or twenty feet from the time they drove onto Adams Street, until the collision occurred; that the bus stopped from five to seven times within these thirteen blocks; that the Bush car at each time stopped back of the bus; that the traffic on Adams Street at this time was very heavy, and within the thirteen blocks Bush could not pass the bus on account of the oncoming traffic; that the bus stopped at, or in the intersection of Homestead Avenue, and that the defendant attempted to pass the bus, but on account of the traffic, could not do so, and drove into the back of the bus, and that the plaintiff was injured by reason of the collision; that there were cars parked on the right of Adams Street; that Adams Street is paved with a twenty foot concrete slab in the center, and thirteen feet of brick on each side of the pavement; that the regular traffic lane of the bus was on the concrete; that each time it stopped, prior to the collision, it drove the right wheels of the bus off of the concrete; that at the time of the collision in question, there were lights inside the bus; that the headlights were burning, and that there were red lights at



people had been together all of the afternoon, and that the accident occurred at 7:30 or 8:00 o'clock in the evening on Water Sunday April 9, 1933; that the regular route for the bus was north on Adams Street; that the bus on Grove and Adams Street approximately thirteen blocks south of Loessend Avenue, and followed directly behind the bus at approximately fifteen or twenty feet from the time they drove onto Adams Street, until the collision occurred; that the bus car at five to seven times within these thirteen blocks; that the bus car at each time stopped back of the bus; that the traffic on Adams Street at this time was very heavy, and within the thirteen blocks from south to north the bus on account of the preceding traffic; that the bus stopped at, or in the intersection of Loessend Avenue, and that the defendant attempted to pass the bus, but on account of the traffic, could not do so, and drove into the back of the bus, and that the plaintiff was injured by reason of the collision; that there were cars parked on the right of Adams Street; that Adams Street is paved with a twenty foot concrete slab in the center, and thirteen feet of brick on each side of the pavement; that the regular traffic lane of the bus was on the concrete; that each time it stopped, prior to the collision, it drove the right wheels of the bus off of the concrete; that at the time of the collision in question, there were lights inside the bus; that the headlights were burning, and that there were red lights at

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the rear of the bus, and a large stop light that turned red, and said, "Stop," when the motorman of the bus would put on his brake preparatory to stopping the bus. The above facts are not in dispute. Practically the only disputed question in this record is, where the bus stopped, at the time of the collision.

It is insisted by the plaintiff and her witnesses that in all prior stops the bus pulled partly off of the concrete slab, and stopped before it came to the intersection, but this time the bus passed the intersection of Homestead Avenue before it stopped, and did not turn to the right before stopping, but at the time the bus stopped, the left wheels were on, or very close to the black line in the center of Adams Street; that as the driver of the car attempted to pass the bus, he saw he could not do so, and turned to the right and before he could stop his car, he collided with the bus. Mrs. Jones, her husband and Mr. Bush all testified to these facts.

Mr. Louis Davis, Jr., a Police Officer, testified that he saw the bus after the accident, and that the left wheels of the bus were near the black line, but he was not interrogated as to whether it was in, or south of the intersection.

It is not disputed that the bus was well lighted, or that the rear lights on the bus were burning, or that the six inch stop light on the back of the bus was in good working order, or that the

the rear of the bus, and a large stop light that turned red, and said, "stop," when the motion of the bus would put on the brake proper-ly the only disputed question is as to whether or not the bus stopped at the time of the collision.

It is insisted by the plaintiff and her witnesses that in all other stops the bus pulled partly off of the concrete strip, and stopped before it came to the intersection, but at this time the bus passed the intersection of Lombard Avenue before it stopped, and did not turn to the right before stopping, and at the time the bus stopped, the left wheels were on, or very close to the black line in the center of Adams Street; and as the driver of the car attempted to pass the bus, he saw he could not do so, and turned to the right and before he could stop his car, he collided with the bus. That

Town, Mrs. Hannah and Mr. Davis all testified to these facts. Mr. Louis Davis, Jr., Police Officer, testified that he saw the bus after the accident, and that the left wheel of the bus was near the black line, but he was not interrogated as to whether it was on, or south of the intersection.

It is not disputed that the bus was well lighted, or that the rear lights on the bus were burning, or that the stop light on the back of the bus was in good working order, or that the



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driver, in stopping the bus, put his foot on the brake, which would light the stop light. The bus was inspected before and after the accident, and all of the lights were found to be in proper working order.

Mr. Homer Land, the driver of the bus, was called as a witness, and testified that in making this stop, he did exactly the same as he had in the five or six previous stops; that he pulled the bus about half way off of the cement, applied his foot brake to which the stop light was attached, and came to a gradual stop; that when the bus stopped, the front end was about four feet south of Homestead Avenue; that no part of the bus had entered the intersection at the time of the collision.

Mr. L. J. Beale, claim agent of the defendant, said that he was notified of the accident and arrived there about 8:40 p.m; that he noticed glass on the pavement which, in his opinion, was at least ten good steps south of the intersection of Adams and Homestead Avenue.

Mr. Irvin Fisher, a workman at the Caterpillar Tractor Company, said that he was operating a filling station at the northeast corner of Adams and Homestead Avenue on Easter Sunday in 1939; that he recalled the accident; that he and his wife were together at the filling station. They heard the crash and went over to the scene of the accident. The bus was lighted and had stopped at the regular

driver, in stopping the bus, but the foot on the brake, which would light the stop light. The bus was stopped before and after the accident, and all of the lights were found to be in proper working order.

Mr. Homer Lane, the driver of the bus, was called as a witness, and testified that in making this stop, he did exactly the same as he had in the five or six previous stops; that he pulled the bus about half way off of the cement, applied the foot brake to which the stop light was attached, and came to a gradual stop; that when the bus stopped, the front end was about four feet south of Woodward Avenue; that no part of the bus had entered the intersection at the time of the collision.

Mr. L. J. Leslie, claim agent of the defendant, said that he was notified of the accident and arrived there about 5:30 p. m.; that he noticed glass on the pavement at the intersection, in his opinion, was at least ten good steps south of the intersection of Adams and Woodward Avenues.

Mr. Edwin Blahut, a workman at the Copley & Tinsley Company, said that he was operating a filling station at the northeast corner of Adams and Woodward Avenues on Easter Sunday in 1939; that he recalled the accident; that he and his wife were together at the filling station. They heard the crash and went over to the scene of the accident. The bus was stopped and had stopped at the regular

stopping point for the bus. The front end of it was south of the intersection, and no part of the bus was in the intersection. It was about half way off of the concrete onto the brick.

Mr. Raymond Furniss testified that he was a passenger on the bus on the evening of the accident; that the speed of the bus was between fifteen and twenty miles an hour; that as the bus stopped at Homestead Avenue, it was hit from the rear by a passenger car; that he got off of the bus and observed the back end of it. The lights were all burning, which included two tail lights. There were also two reflectors below the lights; that so far as he could see, the stop the bus made was like the ordinary stops that it always makes; that no part of the bus was in the intersection of Homestead Avenue, and the right side of the bus was on the brick part of the pavement.

Mrs. Esther Fisher testified that she was at the filling station with her husband. They heard the noise and crash of the accident, and went over to it and noticed where the bus was located in the street. It was on the south side of the intersection and was on the right-hand side of the center of the concrete slab.

Mrs. Viola Whitehead testified that she lived on Adams Street within a block of the accident on Easter Sunday in 1939; that she heard the crash and went up to the scene of the accident; that the bus was stopped before it got into the intersection of Homestead Avenue; that the bus was over the brick part of the pavement more than it was on the concrete slab.



stopping point for the bus. The front end of it was south of the intersection, and no part of the bus was in the intersection. It

was about half way off the concrete onto the brick.

Mr. Raymond Forbes testified that he was a passenger

on the bus on the evening of the accident; that the speed of the bus was between fifteen and twenty miles an hour; that as the bus stopped at Homestead Avenue, it was hit from the rear by a passenger car; that he got off of the bus and observed the back end of it. The lights were

all burning, which included two tail lights. There were also two reflectors below the lights; but so far as he could see, the stop the bus made was like the ordinary stop that it always makes; that no part of the bus was in the intersection of Homestead Avenue, and the right side of the bus was on the brick part of the pavement.

Mrs. Esther Fisher testified that she was at the Illinois station with her husband. They heard the noise and crash of the accident, and went over to it and noticed where the bus was located in the street. It was on the south side of the intersection and was on the right-hand side of the center of the concrete slab.

Mrs. Viola Whitehead testified that she lived on Adams Street within a block of the accident on Easter Sunday in 1930; that she heard the crash and went up to the scene of the accident; that the bus was stopped before it got into the intersection of Homestead Avenue; that the bus was over the brick part of the pavement more than it was on the concrete slab.

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Mrs. Lois Salter testified that in April 1939, she lived at 207 Homestead Avenue which is about a block and a half from the intersection of Homestead and north Adams Street; that she heard a crash and ran out; that she noticed two stop lights on the rear of the bus and there were lights inside; that the bus had stopped about two feet to the right of the black line in the concrete slab, and was about two feet back of the crossing.

Mrs. Ethel Hanchett testified that at the time of the accident, she lived on the corner at the scene of the accident; that she was attracted by the noise of the collision, and went out to observe the bus and car; that the bus had stopped with the front end south of the street intersection, and that no part of the bus was within the intersection.

Mrs. Lydia Eskew testified that she lived on a corner lot next to the scene of the accident, but that her home was on the back of the lot; that they heard the crash and went up to the scene of the accident; that the bus was south of the intersection and to the right side of the black line.

In rebuttal Mr. Fred W. Tuerk was called and testified that he went to the scene of the accident and saw glass on the pavement 20 to 25 feet from the middle of the intersection of Homestead and Adams Street, and that the bus had stopped beyond the line of the crossing.

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Mrs. Lola Salter testified that in April 1935, she lived

at 207 Homestead Avenue which is about a block and a half from the

intersection of Homestead and North Adams Street; that she heard

a crash and ran out; that she noticed two stop lights on the rear

of the bus and there were lights inside; that the bus had stopped

about two feet to the right of the black line in the concrete sidewalk,

and was about two feet back of the crossing.

Mrs. Ethel Hancock testified that at the time of the

accident, she lived on the corner at the scene of the accident; that

she was attracted by the noise of the collision, and went out to

observe the bus and car; that the bus had stopped with the front end

south of the street intersection, and that no part of the bus was

within the intersection.

Mrs. Lydia Baker testified that she lived on a corner lot

next to the scene of the accident, but that her house was on the back

of the lot; that they heard the crash and went up to the scene of the

accident; that the bus was south of the intersection and to the right

side of the black line.

In rebuttal Mr. Fred W. Grant was called and testified

that he went to the scene of the accident and saw first on the pavement

20 to 25 feet from the middle of the intersection of Homestead and

Adams Street, and that the bus had stopped beyond the line of the

crossing.



From a review of this evidence, it is our conclusion that the plaintiff wholly failed to establish that the accident occurred by reason of the bus having stopped after it crossed the curb line of the intersection of Homestead Avenue. It seems to us that credible evidence establishes the fact that after the bus stopped, it was on the south side of Homestead Avenue.

The plaintiff charged in her complaint that the defendant violated Section 188 of Chapter 95 $\frac{1}{2}$  of the Revised Statutes of the State of Illinois, and that by reason of such violation she was injured. The Section of the Statute is as follows: "Parking at right-hand curb. Paragraph 91. On Streets forming a part of the State Highway System, angle parking may be permitted by local ordinance on that portion of the street not under the jurisdiction and control of the State. Where angle parking is not so permitted, every vehicle stopped or parked upon a roadway where there is an adjacent curb shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within 12 inches of the right-hand curb."

The Fifth Paragraph of Count 3 of the amended complaint charges that the 3400 Block of North Adams Street was, and is a part of a street forming a part of the State Highway System, and at the place of the accident angle parking was not permitted by any Ordinance of the City of Peoria, Illinois, and there was an adjacent

From a review of this evidence, it is our conclusion that

the plaintiff wholly failed to establish that the accident occurred by reason of the bus having stopped after it crossed the curb line at the intersection of Homestead Avenue. It seems to us that credible evidence establishes the fact that after the bus stopped, it was on the south side of Homestead Avenue.

The plaintiff charged in her complaint that the defendant

violated Section 128 of Chapter 28 of the Revised Statutes of the State of Illinois, and that by reason of such violation she was injured. The Section of the Statute is as follows: "Within 12 inches of curb." Paragraph 21. On streets forming a part of the State Highway System, angle parking may be permitted by local ordinance on that portion of the street not under the jurisdiction and control of the State. Where angle parking is not so permitted, every vehicle stopped or parked upon a roadway where there is an adjacent curb shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within 12 inches of the right-hand curb."

The Fifth Paragraph of Count 3 of the amended complaint

charges that the 3400 block of North Adams Street was, and is a part of a street forming a part of the State Highway System, and at the place of the accident angle parking was not permitted by any Ordinance of the City of Peoria, Illinois, and there was an adjacent

curb. The defendant, in its answer, denies all of the allegations of these two paragraphs.

A careful reading of the abstract does not disclose where there is any evidence that there was any curb on Adams Street near the place where the accident occurred. It will be observed that the statute applies only to streets that form a part of the State Highway System and "where there is an adjacent curb," and where by local ordinances angle parking is not permitted.

The appellee insists that the Court should take judicial knowledge of all of the Ordinances of the City of Peoria, and decide whether there is, or is not an ordinance allowing angle parking on Adams Street near the place of the collision in question. Section 48 of Chapter 151, of our Statutes so provides, and if it had been a question of law presented to the Court for his decision, no doubt he would take judicial knowledge of the Ordinances of the City of Peoria. In the present case, the complaint alleges that the defendant violated a State Statute which necessarily involves the question whether there is, or is not an ordinance governing the parking on Adams Street near the place of the collision. It is a question of fact for the jury to decide whether the defendant had violated such a statute. The plaintiff should either have shown there was, or was not such an ordinance, or asked the Court to instruct the jury relative to what the ordinances



corp. The defendant, in the answer, denies all of the allegations of these two paragraphs.

A careful reading of the abstract does not disclose where there is any evidence that there was any car on Adams Street near the place where the accident occurred. It will be observed that the statute applies only to streets that form a part of the State Highway System and "where there is an adjacent corp," and where no local ordinance angle parking is not permitted.

The appellee insists that the Court should take judicial knowledge of all of the Ordinances of the City of Peoria, and decide whether there is, or is not an ordinance allowing angle parking on Adams Street near the place of the collision in question. Section 48 of Chapter 181, of our Statutes so provides, and if it has been a question of law presented to the Court for its decision, no doubt he would take judicial knowledge of the Ordinances of the City of Peoria. In the present case, the complaint alleges that the defendant violated a State statute which necessarily involves the question whether there is, or is not an ordinance governing the parking on Adams Street near the place of the collision. It is a question of fact for the jury to decide whether the defendant has violated such a statute. The plaintiff should either have shown there was, or was not such an ordinance, or asked the Court to instruct the jury relative to what the ordinances

11.

were, relative to such parking. This, the plaintiff did not do, and there was nothing presented to the jury for their decision, as to whether the defendant had violated the statute by not driving close to the curb when it stopped its bus. It is our conclusion that because the plaintiff failed to establish the fact, that there was an adjacent curb on the south side of the street near where the bus stopped, and also whether there was any ordinance governing parking on the south side of Adams Street at the place where the accident occurred, she cannot recover upon the third count of her complaint.

Complaint is made by the defendant that the Court erred in not giving the defendant's fifth refused instruction. We think that the jury were fairly well instructed on behalf of the defendant, and this refused instruction was covered by other given instructions. The judgment will be reversed and remanded.

Reversed and Remanded.





7/2. 15.  
302.15.

314 I.A. 205<sup>1</sup>

Gen. No. 9746.

Agenda No. 7.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

FRANK J. WISE,  
Complainant and Appellant,  
vs.  
MARY B. HAYDEN,  
Defendant and Appellee.

Appeal from the  
County Court of  
Will County, Illinois.

WOLFE,-- J.

Frank J. Wise, an Attorney at Law, in Will County, Illinois, started suit against the defendant, Mary B. Hayden, for an attorney's fee of \$175.00, which he claimed was due him from the defendant for professional services rendered to her. The complaint alleges that the defendant employed the attorney to represent her in settlement of certain real estate mortgage notes held and owned by her; that pursuant to said employment, he rendered valuable and extended services therein, and enabled the defendant to receive payment in full on the principal

3141A.205

ALABAMA No. 7.

Vol. No. 5743.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

Appeal from the  
County Court of  
Will County, Illinois.

FRANK J. WISE,  
Complainant and Appellant,

vs.

MARY E. WATSON,  
Defendant and Appellee.

NOTE-- 1.

Frank J. Wise, an Attorney at Law, in Will County, Illinois, started suit against the defendant, Mary E. Watson, for an attorney's fee of \$150.00, which he claimed was due him from the defendant for professional services rendered to her. The complaint alleges that the defendant employed the attorney to represent her in settlement of certain real estate mortgage notes held and owed by her; that payment to said employment, he rendered valuable and extended services therein, and enabled the defendant to receive payment in full on the principal

2.

of said mortgage notes; that upon the completion of the services, the defendant agreed to pay the plaintiff the sum of \$175.00, but now wholly fails and refuses to pay said sum.

The defendant filed her answer in which she admitted the plaintiff was an attorney, but denied each and every other allegation of the plaintiff's complaint. The case was tried before the Court without a jury and at the conclusion of the evidence, judgment was rendered in favor of the defendant. It is from this judgment that the appeal is prosecuted.

The plaintiff introduced evidence to sustain his contention and the defendant introduced evidence to sustain her answer. The trial court, after hearing the evidence of both parties, found that the plaintiff had not proven his case by a preponderance of the evidence. We have read the evidence, as contained in the record, and abstract, and we cannot say that the trial court's finding is against the manifest weight of the evidence.

The Judgment of the Trial Court is affirmed.

Affirmed.



of said mortgage notes; that upon the completion of the services, the defendant agreed to pay the plaintiff the sum of \$15.00, but now wholly fails and refuses to pay said sum.

The defendant filed an answer in which she admitted the plaintiff was an attorney, but denied each and every other allegation of the plaintiff's complaint. The case was tried before the court without a jury and at the conclusion of the evidence, judgment was rendered in favor of the defendant. It is from this judgment that the appeal is prosecuted.

The plaintiff introduced evidence to sustain his contention and the defendant introduced evidence to sustain her answer. The trial court, after hearing the evidence of both parties, found that the plaintiff had not proven his case by a preponderance of the evidence. We have read the evidence, as contained in the record, and abstract, and we cannot say that the trial court's finding is against the manifest weight of the evidence.

The judgment of the Trial Court is affirmed.

Witness my hand and seal of office at St. Louis, Missouri, this 10th day of June, 1914.

OK.  
32, 2.

314 I.A. 205<sup>2</sup>

Gen. No. 9750.

Agenda No. 10.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

823  
156

SMITH P. GIDDINGS,  
Plaintiff-Appellant,  
vs.  
MRS. DORA SENNEFF,  
Defendant-Appellee.

Appeal from the  
Circuit Court of  
Carroll County.

WOLFE,-- J.

Smith P. Giddings took a judgment by confession against Mrs. Dora Senneff in vacation before the Circuit Clerk of Carroll County on January 11, 1941. The note was dated November 7, 1939, the amount of which was \$900.00. Judgment was taken including interest, costs and attorney's fees in the sum of \$1,045.55. Mrs. Dora Senneff filed an affidavit in the Circuit Court asking that the judgment be set aside, or vacated and for leave to plead. This motion was granted and the judgment opened up, and the defendant

76.80

31414.202

Verona No. 10.

Verona No. 10.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

FEBRUARY TERM, A. D. 1942.

*[Handwritten signature]*

Appeal from the  
Circuit Court of  
Carroll County.

SMITH P. GIDDINGS,  
Plaintiff-Appellant,  
vs.  
MRS. DORA SEMMEL,  
Defendant-Appellee.

WOLFE, -- 1.

SMITH P. GIDDINGS took a judgment by confession against Mrs. Dora Semmel in vacation before the Circuit Court of Carroll County on January 11, 1941. The note was dated November 7, 1930, the amount of which was \$300.00. Judgment was taken including interest, costs and attorney's fees in the sum of \$1,040.33. Mrs. Dora Semmel filed an affidavit in the Circuit Court stating that the judgment be set aside, on vacation and for leave to plead. This motion was granted and the judgment opened up, and the defendant



2.

was also granted leave to file an answer. The answer was filed. The case then was tried before the Court without a jury, and the judgment vacated and set aside. Judgment was entered against the plaintiff for costs. It is from this judgment that an appeal is prosecuted to this Court.

The evidence shows that Mrs. Senneff had no dealings whatsoever, with the plaintiff, Giddings, but all of the transactions that Mrs. Senneff had, relative to this note, were carried on by one, Louis Tobias, who was an agent for some Mississippi land that Mrs. Senneff had purchased in that State. Mrs. Senneff's testimony is that she did not know that she was signing a note, but that Mr. Tobias told her that it was a release of some kind necessary to be filed in connection with the land that she had purchased in the State of Mississippi. She also testified that she had no dealings whatsoever, with Mr. Giddings, and that she never received any money, or any other valuable thing in consideration for signing the note. There is no proof whatsoever, that she did receive any valuable consideration for the note.

Mr. Giddings, the plaintiff, testified that he had had conversations with Tobias relative to taking a note from Mrs. Senneff, providing Tobias would procure such a note. He testified that Tobias did bring the note, signed by Mrs. Senneff, to him, and that he gave Tobias \$900.00 in exchange for the note.

was also granted leave to file an answer. The answer was filed. The case then was tried before the Court without a jury, and the judgment vacated and set aside. Judgment was entered against the plaintiff for costs. It is from this judgment that an appeal is prosecuted to this Court.

The evidence shows that Mrs. Sennell had no dealings whatsoever, with the plaintiff, Giddings, but all of the transactions that Mrs. Sennell had, relative to this note, were carried on by one, Louis Tobias, who was an agent for some Mississippi land that Mrs. Sennell had purchased in that State. Mrs. Sennell's testimony is that she did not know that she was signing a note, but that Mr. Tobias told her that it was a release of some kind necessary to be filed in connection with the land that she had purchased in the State of Mississippi. She also testified that she had no dealings whatsoever, with Mr. Giddings, and that she never received any money, or any other valuable thing in consideration for signing the note. There is no proof whatsoever, that she did receive any valuable consideration for the note. Mr. Giddings, the plaintiff, testified that he had had conversations with Tobias relative to taking a note from Mrs. Sennell, providing Tobias would procure such a note. He testified that Tobias did bring the note, signed by Mrs. Sennell, to him, and that he gave Tobias \$300.00 in exchange for the note.

3.

It is first insisted by the appellant that the Court erred in opening the judgment on the motion of the plaintiff, because the affidavit in support thereof, signed by Mrs. Senneff, did not set forth a valid defense in compliance with the Statute. No doubt, there are numerous matters in the affidavit which are stated on information and belief that state conclusions rather than facts, but the affidavit does state positively that there was no consideration for the note, which would be a valid defense; also the affidavit states facts, if true, that there was fraud in the procurement of the note. We find no merit in appellant's contention that the Court erred in opening the judgment on account of the insufficiency of the affidavit of the defendant.

From a review of the evidence, it seems to us that the Court must have found that in this transaction in the procurement of the note, and the delivery of the money, that Tobias was acting as the agent of Smith P. Giddings, instead of the appellee, Mrs. Senneff. The proof is positive that Mrs. Senneff did not receive any money whatsoever for this note. While Mrs. Senneff's testimony shows that she is of advanced age, and was much confused in regard to a great many details, it can be gathered from the whole of the evidence that she did not know that she was signing a promissory note, but thought that she was signing a release of some kind. On either one of these issues we think the Court would have been justified in finding in favor of the defendant.

We find no reversible error in the case, and the judgment of the Trial Court is affirmed.

Affirmed.



It is first insisted by the appellant that the Court erred in opening the judgment on the motion of the plaintiff, because the affidavit in support thereof, signed by Mrs. Sennell, did not set forth a valid defense in compliance with the statute. He asserts that there are numerous matters in the affidavit which are stated on information and belief that state conclusions rather than facts, but the affidavit does state positively that there was no negotiation for the note, which would be a valid defense; also the affidavit states, in fact, that there was fraud in the procurement of the note. We find no error in appellant's contention that the Court erred in opening the judgment on account of the insufficiency of the affidavit of the defendant.

From a review of the evidence, it seems to us that the Court must have found that in this transaction in the procurement of the note, and the delivery of the money, that Tobias was acting as the agent of Smith T. Giddings, instead of the appellee, Mrs. Sennell. The proof is positive that Mrs. Sennell did not receive any money whatsoever for this note. While Mrs. Sennell's testimony shows that she is of advanced age, and was much confused in regard to a great many details, it can be gathered from the whole of the evidence that she did not know that she was signing a promissory note, but thought that she was signing a release of some kind. On either one of these issues we think the Court would have been justified in finding in favor of the defendant.

We find no reversible error in the case, and the judgment of the Trial Court is affirmed.

OK 25.

314 I.A. 206

Gen. No. 9754.

Agenda No. 13.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1942.

833  
156

RUTH PEPPER, )  
Appellee, )  
vs. )  
FAITH ARMSTRONG, et al., )  
Faith Armstrong, )  
Appellant. )

Appeal from  
Circuit Court,  
Winnebago  
County.

WOLFE,-- J.

This is a suit in equity wherein the plaintiff, Ruth Pepper, as the legal owner and holder of a certain promissory note secured by a trust deed on real estate in Winnebago County, Illinois, asks to foreclose such trust deed. The parties defendant to said suit are, John G. Foster and Ethel Foster, his wife, makers of the note secured by the trust deed, and Luke Wendell and Phyllis Wendell, husband and wife, contract purchasers for the property. All of the above named persons were the grantors in said deed of trust wherein, David D. Madden was appointed trustee in said instrument, with others as successor trustees.

250

3141.A.206

Verge no. 13.

Ver. no. 2754.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1942.

RUTH TEPER,

Appellee,

vs.

PAITH ARSTRONG, et al.,  
Plaintiffs.

Appellant.

Appeal from  
Circuit Court,  
Winnebago  
County.

WOLFE,-- J.

This is a suit in equity wherein the Plaintiff, Ruth Teper, as the legal owner and holder of a certain promissory note secured by a trust deed on real estate in Winnebago County, Illinois, asks to foreclose such trust deed. The parties defendant to said suit are, John D. Foster and Ethel Foster, his wife, makers of the note secured by the trust deed, and Luke Kennell and Phyllis Kennell, husband and wife, contract purchasers for the property. All of the above named persons were the grantors in said deed of trust wherein, David D. Eagan was appointed trustee in said instrument, with others as successor trustees.



2.

Homer Ives was also made a party defendant as the owner and holder of another note secured by a deed of trust on said premises, but his note has been paid, so is not now a party to the litigation. The defendant, Faith Armstrong, is the record title holder of the premises sought to be foreclosed upon, and is the assignee of articles of agreement for warranty deed under which Luke Wendell and wife are purchasing the premises. The other parties defendant are not interested in the appeal, as any interest that they might have had was on a different deed of trust.

The complaint, as amended, is in the usual form stating the makers of the note, and the property covered by the trust agreement. It is alleged that the plaintiff is the legal holder and owner of a note of \$1,000.00 with interest at seven per cent payable semi-annually; that default has been made in the payment of said note, and she asks for foreclosure of the trust deed.

The defendant, Faith Armstrong, filed a separate answer in which she admitted the making, execution and delivery of the promissory note in question, and also the execution of the trust deed given to secure the payment of said note. She denied that no part of the principal of said note was paid, and alleged that all, or nearly all of the principal on the note had been paid. She further alleged that Luke Wendell and Phyllis Wendell had paid on their contract of purchase, practically all that was due on the same, to David D. Madden, who was

Horner lives was also made a party defendant as the owner and holder of another note secured by a deed of trust on said premises, but his note has been paid, so is not now a party to the litigation. The defendant, Faith Armstrong, is the record title holder of the premises sought to be foreclosed upon, and is the assignee of rights of a deed of trust warranty deed under which Luke Wendell and wife are purchasing the premises. The other parties defendant are not interested in the premises as any interest that they might have had was on a different deed of trust.

The complaint, as amended, is in the usual form stating the facts of the note, and the property covered by the trust agreement. It is alleged that the plaintiff is the legal holder and owner of a note of \$1,000.00 with interest at seven per cent payable semi-annually; that default has been made in the payment of said note, and she asks for foreclosure of the trust deed.

The defendant, Faith Armstrong, filed a separate answer in which she admitted the making, execution and delivery of the promissory note in question, and also the execution of the trust deed given to secure the payment of said note. She denied that no part of the principal of said note was paid, and alleged that all, or nearly all of the principal on the note had been paid. She further alleged that Luke Wendell and Paylis Wendell had paid on their contract of purchase, practically all that was due on the same, to David D. Padden, who was

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the agent and attorney for Ruth Pepper; that Madden had paid to Ruth Pepper the interest on her note, but had not paid the principal, as collected by him, from the Wendells. She made a tender to the attorney for Ruth Pepper of the amount which she estimated was the balance due on the note, after deducting the amounts paid by the Wendells to Madden, that had not been credited on the principal of the note.

Faith Armstrong denied that the plaintiff had a prior lien upon the premises for any amount above that which had been tendered by her to the plaintiff. She also filed a counter claim and asked for an injunction to restrain Ruth Pepper from enforcing a lien for a greater amount than she had tendered to her, as being the balance due on the note in question. In the counter claim it is also alleged that David D. Madden, the Trustee mentioned in the deed of trust, was acting as agent and attorney for Ruth Pepper, and that said Madden notified Francis S. Keye, agent for Faith Armstrong, who had been collecting the payments on the contract of purchase from Luke Wendell and Phyllis Wendell, that said trust deed and note were in default, and that the owner and holder thereof, had demanded possession of said premises, until said indebtedness, interest and principal was satisfied, and paid in full, and that the said David D. Madden, trustee, agent and attorney for Ruth Pepper, notified Luke Wendell and Phyllis Wendell, that said trust deed and note were in default, and that Ruth Pepper demanded possession of said premises, and that the payments on said



the agent and attorney for Ruth Pepper; that Madgen had paid to Ruth Pepper the interest on her note, but had not paid the principal, as collected by him, from the Wendells. She made a tender to the attorney for Ruth Pepper of the amount which she estimated was the balance due on the note, after deducting the amount paid by the Wendells to Madgen, but had not been credited on the principal of the note. Faith Armstrong denied that the plaintiff had a prior claim upon the premises for any amount above that which had been collected by her to the plaintiff. She also filed a counter claim and asked for an injunction to restrain Ruth Pepper from enforcing a lien for a greater amount than she had tendered to her, as being the balance due on the note in question. In the counter claim it is also alleged that David D. Madgen, the trustee mentioned in the deed of trust, was acting as agent and attorney for Ruth Pepper, and that said Madgen notified Wendells S. Woye, agent for Faith Armstrong, who had been collecting the payments on the contract of purchase from Lake Wendell and Phyllis Wendell, that said trust deed and note were in default, and that the owner had ordered foreclosure, had demanded possession of said premises, and until said indebtedness, interest and principal was satisfied, and paid in full, and that said David D. Madgen, trustee, agent and attorney for Ruth Pepper, notified Lake Wendell and Phyllis Wendell, that said trust deed and note were in default, and that Ruth Pepper demanded possession of said premises, and that the payments on said

4.

contract must be made to him on behalf of Ruth Pepper; that Madden as trustee and as agent and attorney for Ruth Pepper, did enter in possession of the premises and retained the same until the time of his death, and that he collected on said contract, the sum of \$1,093.00 and paid to Ruth Pepper the sum of \$409.00.

The plaintiff filed a reply to the answer of Faith Armstrong and an answer to the counter claim, and admitted most of the allegations of the answer and counter claim, but expressly denied that David D. Madden was her agent and attorney when he collected anything upon the contract of purchase of the Wendells.

The case was tried before the Court without a jury, who found the plaintiff was entitled to foreclose her deed of trust, and found the amount due, together with costs and reasonable attorney fees, and entered the decree accordingly. It is from this decree that Faith Armstrong prosecutes this appeal.

The note and trust deed in question was dated May 1, 1925. Shortly thereafter Ruth Pepper purchased from David D. Madden the note in question, for \$1,000.00, which was the face value of the note. David D. Madden was the trustee named in said deed of trust, and he delivered to her, the note, the trust deed and abstract to the premises. The interest was paid regularly for some time on the note until along in the fall of 1934, there was some interest due and unpaid. Ruth Pepper

contract was made to him on behalf of Ruth Pepper; that Nathan as trustee and as agent and attorney for Ruth Pepper, did enter in possession of the premises and retained the same until the time of his death, and that he collected on said contract, the sum of \$1,093.00 and paid to Ruth Pepper the sum of \$493.00.

The plaintiff filed a reply to the answer of Nathan Armstrong and an answer to the counter claim, and admitted that the sum of the answer and counter claim, but expressly denied that David D. Nathan was not agent and attorney when he collected anything upon the contract of purchase of the premises.

The case was tried before the Court without a jury, and found the plaintiff was entitled to recover her debt of trust, and found the amount due, together with costs and reasonable attorney fees, and entered the decree accordingly. It is from this decree that Nathan Armstrong prosecutes this appeal.

The note and trust deed in question was dated May 1, 1925. Shortly thereafter Ruth Pepper purchased from David D. Nathan the note in question, for \$1,000.00, which was the face value of the note. David D. Nathan was the trustee named in said deed of trust, and he delivered to her, the note, the trust deed and abstract to the premises. The interest was paid regularly for some time on the note until about the fall of 1934, there was some interest due and unpaid. Ruth Pepper



took the note and trust deed to David D. Madden's office and had a conversation with him relative to the note and the back interest. The note bears seven per cent interest, and it was agreed between Mr. Madden and Ruth Pepper that it would be better not to try to collect the note, on account of the large interest rate, but just collect the interest and let the note stand as it was. She left the note and trust deed with Mr. Madden, and he collected the interest and remitted to her regularly from that time up until the time of his death. Ruth Pepper testified positively that the note was simply there for him to collect the interest, and past due interest. She said that he collected and paid her the back interest at the rate of \$10.00 per month until all of the delinquent interest was paid. The principal and interest on the note were payable at the office of David D. Madden. So far as the record discloses Ruth Pepper had no knowledge that the contract of purchase between the Wendells and Faith Armstrong was in the possession of David D. Madden, or that he had anything to do with such contract, nor did she have any notice whatsoever, that the Wendells were in possession of said real estate under contract for deed. How the contract for a deed came into the possession of Madden, is not disclosed by the evidence in this case.

In the counter claim of the appellant, it is alleged that David D. Madden, as the agent and attorney for Ruth Pepper, demanded of the Wendells the possession of the premises in question, and

took the note and trust deed to David D. Madden's office and had a conversation with him relative to the note and the back interest. The note bears seven per cent interest, and it was agreed between Mr. Madden and Ruth Pepper that it would be better not to try to collect the note, on account of the large interest rate, but that collect the interest and let the note stand as it was. She left the note and trust deed with Mr. Madden, and he collected the interest and remitted to her regularly from that time on until the time of his death. Ruth Pepper testified positively that the note was signed there for him to collect the interest, and was due interest. She said that he collected and paid her the back interest at the rate of \$10.00 per month until all of the delinquent interest was paid. The principal and interest on the note were payable at the office of David D. Madden. So far as the record discloses Ruth Pepper had no knowledge that the contract of purchase between the Wendells and Leith Armstrong was in the possession of David D. Madden, or that he had anything to do with such contract, nor did she have any notice whatsoever, that the Wendells were in possession of said real estate under contract for deed. Now the contract for a deed came into the possession of Madden, it is not disclosed by the evidence in this case.

In the counter claim of the appellant, it is alleged that David D. Madden, as the agent and attorney for Ruth Pepper, demanded of the Wendells the possession of the premises in question, and

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actually took possession of the same for Ruth Pepper; that David D. Madden wrote a letter to Luke Wendell to this effect. This contention of the appellant is not sustained by the evidence. Luke Wendell did testify that David D. Madden wrote him a letter and after that, he made his payments on the contract of purchase to Mr. Madden. An examination of the record discloses that Luke Wendell was called as an adverse witness by Faith Armstrong and that the attorney for Ruth Pepper challenged her right to call him as such witness. The Court permitted him to testify over the objection of the plaintiff, because there was a controversy between the defendants themselves, and in order to properly adjudicate the rights of the defendants, this testimony was admitted, but the Court held that such testimony would not be binding upon the plaintiff.

The controversy appears to be one of fact only, that is, whether at the time David D. Madden collected the payments from the Wendells on the contract of purchase of the premises, he was acting as the agent of Ruth Pepper, or the agent of the owner of the contract of purchase. This was a question of fact squarely submitted to the trial court for his determination. The defendant, by her answer and counter claim, charged that Madden was the agent of Ruth Pepper and by the reply and answer to the counter claim, Ruth Pepper denied that he was her agent or attorney for such purpose. The trial court evidently held that David D. Madden was not the agent and attorney



actually took possession of the same for Ruth Pepper; that Wendell D. Madden wrote a letter to Ruth Pepper to this effect. This contention of the appellant is not sustained by the evidence. Wendell D. Madden testified that he wrote the letter and after that, he made his payment on the contract of purchase to the agent. An examination of the record discloses that Wendell D. Madden was called as an adverse witness by Ruth Pepper and that the attorney for Ruth Pepper questioned her right to call him as such witness. The Court permitted him to testify over the objection of the defendant, because there was a controversy between the defendant and himself, and in order to properly adjust the rights of the defendant, the testimony was admitted, but the Court held that such testimony would not be binding upon the plaintiff.

The controversy appears to be one of fact only, that is, whether at the time David D. Madden collected the payments from the Wendell D. Madden on the contract of purchase of the premises, he was acting as the agent of Ruth Pepper, or the agent of the owner of the contract of purchase. This was a question of fact separately submitted to the trial court for his determination. The defendant, by her answer and counter claim, charged that Madden was the agent of Ruth Pepper and by the reply and answer to the counter claim, Ruth Pepper denied that he was her agent or attorney for such purpose. The trial court evidently held that David D. Madden was not the agent and attorney

7.

for Ruth Pepper in the collections of these amounts on said contract. In the decree in his finding of facts, the Court found that the plaintiff has established her complaint as alleged. This is equivalent to a finding of fact, that David D. Madden was not her attorney in such collection.

The Court also adjudicated rights among other defendants, which has no bearing upon the controversy in question, so we have not attempted to discuss the equities among the other parties.

We find no reversible error in the case, and the decree appealed from is hereby affirmed.

Affirmed.

for Roth Paper in the collection of these records on said contract.

In the decree in this finding of facts, the Court found that the

plaintiff has established her complaint as alleged. This is equivalent

to a finding of fact, and David D. Walker was not her attorney in

and collection.

The Court also adjudicated rights among other defendants,

which has no bearing upon the controversy in question, and we have not

attempted to discuss the questions among the other parties.

We find no reversible error in the case, and the decree

is affirmed.

ATTEST.



Abstract

General number 9296.

Agenda number 4.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A. D. 1942

BYRON M. DOSSETT, Adminis-  
trator of the Estate of  
DALE DOSSETT, Deceased,

Plaintiff-Appellee,

-vs-

ROBERT ANDERSON,

... Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT  
OF TAZEWELL COUNTY.

314 I.A. 376<sup>1</sup>

HONORABLE JOSEPH E. DAILY,

Judge Presiding.

HAYES, P. J. :

An action was brought by the father of Dale Dossett, as Administrator, for his wrongful death in an automobile accident, against Robert Anderson, the defendant, who was the driver of the car in which the deceased was a passenger. The defendant was charged with willful and wanton misconduct in the operation of the automobile. The defendant was sixteen years of age at the time of the accident, and the deceased was thirteen. The death occurred on September 14, 1937 at about nine - ten o'clock on state route 122 (which ran east and west.) This road was the usual eighteen foot slab with a black line in the center. At the place of the accident the road was straight and level.

Shortly before the accident, the defendant met the deceased Dale Dossett, Glen Rhoades, his brother Velde Rhoades and Bob Hitt on a street corner in the village of Hopedale, and invited them for a ride. The four boys

SECRET

George Street 4

October 1st 1944

IN THE DISTRICT COURT

OF THE DISTRICT OF COLUMBIA

FILED IN CASE NO.

100-100000-10000

|                              |   |                        |
|------------------------------|---|------------------------|
| THE UNITED STATES OF AMERICA | : | PLAINTIFF              |
| VS.                          | : | JOHN ROBERT LEE        |
| BY _____                     | : | Attorney for Plaintiff |
| JOHN ROBERT LEE              | : | DEFENDANT              |
| BY _____                     | : | Attorney for Defendant |

8141A.886

DATE: 1. 1. 1.

in action was brought by the father of said  
 deceased, as administrator, for his wrongful death in an  
 automobile accident, against Robert Lee, the defendant,  
 who was the driver of the car in which the deceased was a  
 passenger. The defendant was charged with willful and  
 negligent misconduct in the operation of the automobile. The  
 defendant was sixteen years of age at the time of the accident,  
 and the deceased was thirteen. The death occurred on  
 September 14, 1937 at about nine - ten o'clock on State  
 Route 122 (which runs east and west). This road was the  
 usual highway used with a black line in the center.  
 At the place of the accident the road was straight and level.  
 Shortly before the accident, the defendant met  
 the deceased Dale Lee, who was driving a 1934 Ford  
 sedan and was left on a street corner in the village of  
 Hopewell, and invited them for a ride. The four boys

accepted the invitation and got into the car. The deceased sat in the front seat with the driver and the other three boys in the rear seat. After riding out on the hard road a few miles they started back towards Hopedale. It was dark at the time, and was drizzling rain, which it had been doing for some time. The shoulder of the hard road was soft; the visibility on account of the atmospheric condition was poor, and the pavement was wet.

The accident happened about one and a quarter miles west of Hopedale, on the south side of the concrete. At this point, and some distance west of it, there is a dirt shoulder from six to eight feet wide. South of this shoulder is a ditch about two feet deep with sides that slope gradually. Across this ditch is a culvert over which runs a south bound private driveway that leads into a farm house. This culvert is estimated to be about twenty feet wide. It has a culvert head at each end. The heads are about three and one-half to four feet wide (north and south) and extend about ten inches above the level of the driveway and are in line with a ditch along the south side of the state highway. At a point about one hundred yards west of the culvert the car left the concrete, ran off on the south shoulder of the road; proceeded easterly along said shoulder a distance of about one hundred yards, until it collided with the west end of the culvert above described where it turned over, severely injuring Dale Dossett, from which injuries he died two days later.

It appears from the evidence that at the time the car slipped off the pavement it was going at a rate of fifty or sixty miles per hour. The two Rhoades boys and the Hitt boy testified that the car did not slacken speed from the



collected the investigation and the information. The defendant was in the front seat with the driver and the other two boys in the rear seat. After riding out on the road a few miles they started to come back. It was dark at the time, and was raining hard, which is not good going for some time. The situation of the road was such that the visibility on account of the atmospheric conditions was poor, and the pavement was wet.

The accident happened about one and a quarter miles west of Hopewell, on the south side of the concrete. At this point, and some distance west of it, there is a ditch another from six to eight feet wide. South of this ditch is a ditch about two feet deep with sides that slope gradually. Across this ditch is a culvert over which runs a board walk private driveway that leads into a farm house. This culvert is estimated to be about twenty feet wide. To the left of the culvert at each end. The banks are about three and one-half to four feet wide (north and south) and extend about ten inches above the level of the driveway and are in line with a ditch along the south side of the state highway. At a point about one hundred yards west of the culvert the car left the concrete, ran off on the south shoulder of the road; proceeded eastward along said shoulder a distance of about one hundred yards, until it collided with the west end of the culvert above described where it struck over, severely injuring the driver, from which injuries he died two days later.

It appears from the evidence that at the time the car slipped off the pavement it was going at a rate of thirty or thirty-five per hour. The two teenage boys and the driver testified that the car was old but driven from the

time it went off the pavement until it hit the culvert.

The defendant offered the testimony of Velde Rhoades taken before the Coroner's inquest which was to the effect that just before the accident Dale Dossett said something about looking at the gas gage. Bob, the boy who was driving, looked down and showed him where it was and at that time he ran off the road.

Three of the boys that were in the car at the time of the accident testified for the plaintiff. The only evidence offered by the defendant was the testimony of Velde Rhoades and Robert Hitt, given at the Coroner's inquest and the statements given by these two to an investigator, shortly after the occurrence. The jury returned a verdict of five thousand dollars for the plaintiff.

The defendant contends that the trial court committed prejudicial error in refusing to withdraw a juror and declare a mistrial on account of one of the prospective jurors answering an inquiry as to whether there was anything that would cause him to be inclined one way or the other. He answered: "I know the insurance company that is on this case. They are a neighbor of mine." Defendant then made a motion to withdraw a juror, and called for a mistrial. Plaintiff's counsel then stated to the court that the question was asked in complete good faith; that he did not intend nor expect to be answered in such a manner; that it is the usual question propounded to a prospective juror, to determine whether there was anything that would make the juror an unfair juror; that if the prospective juror was interrogated outside of the presence of the remainder of the jurors that

that it went out the pavement until it hit the sidewalk.

The defendant offered the testimony of various witnesses taken before the coroner's inquest which was to the effect that just before the accident John Conner was standing about looking at the car. John, the boy who was driving, looked down and showed his wheel it was and at that time he ran off the road.

Three of the juries that were in the case at the time of the accident testified for the plaintiff. The only evidence offered by the defendant was the testimony of John Conner and Robert Pitt, driver of the defendant's machine. The statements given by these two to an investigator, shortly after the occurrence. The jury returned a verdict of five thousand dollars for the plaintiff.

The defendant contends that the trial court erred in prejudicial error in refusing to withdraw a juror and declare a mistrial on account of one of the prospective jurors answering an inquiry as to whether there was anything that would cause him to be inclined one way or the other. He answered: "I know the insurance company that is on this case, they are a neighbor of mine." Defendant then asked motion to withdraw a juror, and asked for a mistrial. Plaintiff's counsel then stated to the court that the question was asked in complete good faith; that he did not intend nor expect to be answered in such a manner; that it is the usual question propounded to a prospective juror, to determine whether there was anything that would cause the juror to incline in favor of the prospective juror was introduced outside of the presence of the recorder or the jurors that



the facts would be produced to show that a few days prior to the calling of this case an employee of the insurance company by the name of Kenneth Kumpf, who was a friend of the particular juror knowing at the time that the juror was serving and had stated to the juror in a question: "You know my company has several cases on that calendar. One of them is the Dossett case." The plaintiff took the position that the juror would never have made the statement if it had not been for the conduct of the employee of the insurance company. The Court then states: "I am not going to examine the juror, but I think this Mr. Kumpf should be examined. Do you think, if this did happen, his statement would be immaterial?" Counsel for the defendant then states: "Yes, it would be immaterial from the standpoint of whether or not there is any prejudicial statement in the record. I think if this happened, Kumpf would be put on the pan." It appears that if the answer made by the juror was prejudicial it was brought about by the insurance company rather than by the plaintiff.

In the case of Williams v. Consumers Company, 352 Ill. 51, a similar matter occurred. The Court stated: "We are urged by defendant to reverse the judgment of the jury, the trial court and the Appellate Court because of a reply made by witness McCarthy wherein he mentioned an insurance company. After stating that he went to the Consumers Company the next morning to report the accident, McCarthy was asked by the attorney for plaintiff: "What did you do, if anything?" and he answered, "I went up there and explained to him, and he sent me to the insurance company." This answer was unresponsive to the question put, but the attorney for plaintiff immediately assured the court that

the fact would be produced to show that a few days prior to the calling of this case an employee of the insurance company by the name of Kenneth Murphy, who was a friend of the plaintiff, was working at the time that the injury was received and had stated to the plaintiff a question: "You know my company has several cases on that calendar. One of them is the present case." The plaintiff took the position that the injury would never have made the statement if it had not been for the conduct of the employee of the insurance company. The court then asked: "I am not going to examine the injury, but I think this Mr. Murphy should be examined. Do you think, if this did happen, his statement would be immaterial?" Counsel for the defendant then asked: "Yes, it would be immaterial from the standpoint of another or not there is any material statement in the record. I think it is immaterial, injury would be put on the bar." It appears that if the answer made by the plaintiff was immaterial it was brought about by the insurance company rather than by the plaintiff.

In the case of Williams v. Consumers Company, 352 Ill. 21, a similar matter occurred. The court stated: "We are tried by defendant to reverse the judgment of the jury, the trial court and the Appellate Court because of a reply made by witness McCarthy wherein he mentioned an insurance company. After stating that he went to the Consumers Company the next morning to report the accident, McCarthy was asked by the attorney for plaintiff: "What did you do, if anything?" and he answered, "I went up there and explained to him, and he sent me to the insurance company." This answer was unresponsive to the question put, but the attorney for plaintiff immediately secured the court that

he did not know that the witness was going to make such an answer. No motion was made by counsel for defendant to have the answer stricken nor did he request the court to instruct the jury to disregard the statement. Instead, he moved to withdraw a juror and to have the court declare a mis-trial. This motion was denied and the case proceeded. This ruling of the court is alleged to be erroneous, and numerous cases are cited where under different circumstances this court has at times reversed a judgment and remanded the cause where improper remarks and questions of an attorney have been asked a witness with the apparent purpose of informing the jury that an insurance company, rather than the party sued, would be liable for any damages assessed. We have examined these cases but find none where a mis-trial has ever been granted on account of an inadvertent or unresponsive answer of a witness to a legitimate inquiry. Generally, where prejudicial error has been declared it is found to have been due to some misconduct or improper remarks or questions of counsel, oft-times repeated, and calculated to influence or prejudice the jury. \* \* \* These and the other cases cited by defendant on this point are therefore to be distinguished from the case before us, where no misconduct or improper remark is ascribed to plaintiff's attorney, and where the trial judge was evidently satisfied that the witness had simply volunteered his unresponsive remark concerning the insurance company without any obvious design or intent, either on the part of the witness or the attorney, to prejudice defendant. \* \* \* Under these circumstances the ruling of the trial court in denying the motion for a mis-trial was correct."

In the present case defendant's counsel did not make any motion to have the answer stricken nor did he ask the court to instruct the jury to disregard the statement.



he did not know that the witness was going to make such an answer. His motion was made by counsel for defendant to have the answer withdrawn not at the request of the court to instruct the jury to disregard the statement. Instead, he moved to withdraw a juror and to have the court declare a mistrial. This motion was denied and the case proceeded. This ruling of the court is cited as an example, and numerous cases are cited where similar circumstances exist and the court has at times reversed a judgment and remanded the case where improper remarks and questions of an attorney have been asked a witness with the apparent purpose of influencing the jury that an insurance company, through fault of a party sued, would be liable for any loss or accident. He has examined these cases and find none where a mistrial has ever been granted on account of an irrelevant or unresponsive answer of a witness to a legitimate inquiry. Generally, where prejudicial error has been decided it is found to have been due to some misconduct or improper remark or question of counsel, oft-times repeated, and calculated to influence or prejudice the jury. \* \* \* These and the other cases cited by defendant on this point are authorities to be distinguished from the case before us, where no misconduct or improper remark is ascribed to plaintiff's attorney, and where the trial judge was evidently satisfied that the witness was simply volunteered his unresponsive remark concerning the insurance company without any obvious design or intent, either on the part of the witness or the attorney, to prejudice defendant. \* \* \* Under these circumstances the ruling of the trial court in denying the motion for a mistrial was correct.

In the present case defendant's counsel did not make any motion to have the answer withdrawn nor did he ask the court to instruct the jury to disregard the statement.

Later in the trial the defendant called the investigator for the Insurance Company and had him testify that he acted in the capacity as an investigator for the insurance company and obtained the written statements from the witnesses shortly after the accident.

There was evidence introduced by the plaintiff tending to prove, that the accident happened upon a paved highway in the night time, when it was raining with a wet and slippery pavement; that the shoulders of the highway were soft and muddy, and that the visibility was poor. One witness testified that the driver of the car could see about twenty feet ahead; that under these hazardous conditions the defendant was operating his car at a high rate of speed; that he permitted his car to leave the concrete pavement and travel on the shoulder for about one hundred yards without reducing its speed; that he hit the culvert with such terrific force so as to cause the car to turn twice end over end. With this evidence in the record, it was proper for the trial court to submit the question of willful and wanton misconduct of the defendant to the jury.

In many cases an attempt has been made to define accurately the difference between ordinary negligence and willful and wanton misconduct. It is a very difficult thing to do. The more recent cases have been content with the statement that whether an act is willful and wanton depends on the particular circumstances of each case.

In Bernier v. Illinois Central R. R. Co., 296 Ill. 464, the Court said: "It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers





equivalent to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness or wantonness." In *Bremer v. L. E. & W. R. R. Co.*, 318 Ill. 11, it was said: "What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement." However, the decided cases seem to agree that one of the factors distinguishing a wilful and wanton act is, such absence of care for the person of another as exhibits a conscious indifference to consequences. *Farley v. Mitchell*, 282 Ill. App. 555. The case of *Murphy v. King*, 284 Ill. App. 74, states: "An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness."

Courts of review will not set aside verdicts on questions of fact unless said verdicts are against the manifest weight of evidence. We cannot hold under this record that the manifest weight of the evidence is against the verdict and judgment entered herein.

Complaint is made of what the defendant claims was improper and prejudicial remarks by the attorney for the plaintiff in his closing argument with the jury, but an examination of these remarks show that they were based on facts

... to a willful or negligent act. ...  
... of which is directly dependent upon the particular  
... of each case. ... the occasion to ...  
... is no reason there is a lack of regard for the  
... of others is still ... the ... of willful-  
... or ... . ...  
... it is ... : " ...  
... has ...  
... to ... its ... and in the ... of  
... is no ... upon the particular ...  
... as not to be ... of ...  
... the ... case ... to ... one of the  
... maintaining a willful and ... and,  
... of ... for the ... of another as exhibits a  
... in ... as ... . ...  
... App. 111. App. 255. ...  
... App. 74. ...  
... to the ... of the person or property of another,  
... and an entire ... of ... for the ... person or  
... property of others, ... as ...  
... to ... , ... or ... willful-  
... need."

... of ... will not ...  
... of fact ... will ... the ...  
... of evidence. ... hold under this ...  
... the ... of the evidence is ... the ...  
... and judgment ...

... is made of ... the ...  
... and ... by the ...  
... in the ... with the ... but an exam-  
... of these ... show that they were based on facts

within the record or statements of what the attorneys view of the law was covering the case and we find nothing of such inflammatory nature as would cause reversible error. We find nothing in the instructions of such a serious nature as to cause a reversal.

For the reasons set out herein the judgment of the Circuit Court is hereby affirmed.

JUDGMENT AFFIRMED.



within the record or statements of what the attorneys did  
of the law was covering the case and we find nothing of  
such inflammatory nature as would make reversible error.  
We find nothing in the instructions of such a serious nature  
as to cause a reversal.

For the reasons set out herein the judgment of  
the Circuit Court is hereby affirmed.

IN WITNESS WHEREOF,

65

Agenda number 7.

IN THE APPELLATE COURT  
OF ILLINOIS  
THIRD DISTRICT  
FEBRUARY TERM, A.D. 1942

314 I.A. 376<sup>2</sup>

The plaintiff herein recovered a judgment of four thousand dollars against the defendant for personal injuries sustained by her in an automobile accident which took place about 7:45 o'clock P.M. on May 31, 1937, at the intersection of a gravel road (which ran north and south) with U.S. Route 150 (which ran east and west).

Plaintiff was riding as a passenger in the rear seat of an automobile owned and driven by the defendant. She charges defendant with willful and wanton conduct in the operation of his car. The intersection in question was known as 'Chaffer's Corners' situated about one mile south and one mile west of the village of Deer Creek in Tazewell County. At that point Route 150 is a concrete slab eighteen feet wide, and lies practically on a level for half a mile in each direction from the intersection. The gravel road intersects it at a right angle from the north. Going south on the gravel road from the intersection there is a ten foot jog to the east.

Exhibit

General number 3382, 1935

IN THE DISTRICT COURT

OF THE STATE OF

MISSISSIPPI

IN REPLY TO

Plaintiff's Motion for Summary Judgment

Defendant's Motion for Summary Judgment

-vs-

JOHN J. BARNES, JR.

Defendant-Appellant

WITNESSES

The plaintiff herein recovered a judgment of ten thousand dollars against the defendant for personal injuries sustained by her in an automobile accident which took place about 7:45 o'clock A.M. on May 11, 1937, at the intersection of a gravel road (which ran north and south) with U.S. Route 150 (which ran east and west).

Plaintiff was riding on a passenger in the rear seat of an automobile owned and driven by the defendant. The defendant with William and Vernon Conner in the operation of his car. The intersection in question was known as "Barnes' Corner" situated about one mile south and one mile west of the village of Oak Creek in Lawrence County. At that point Route 150 is a two-lane road of about 100 feet wide and lies practically on a level for half a mile in each direction from the intersection. The gravel road intersected it at a right angle from the north. Going south on the gravel road from the intersection there is a gravel road for about one mile



There is a school house at the southwest corner of the intersection. On the northwest corner of the intersection was a grove of catalpa trees which extended north about two hundred feet on the west side of the gravel road. These, with some other trees, came up to the fence line. Some of the branches hung over the fence and extended to within six feet from the ground. On the west side of the graveled road, at this point, there was a ditch. On the west edge of the ditch and about five and one-half feet from the west fence there was a 'stop' sign, a short distance north of the concrete. This sign was about four feet high from the level of the gravel. On the northeast corner of the intersection was a set of farm buildings known as the Chaffer homestead. The house was about one hundred feet north of the hard road, and one hundred and twenty feet east of the gravel road. There was a barn and a crib that stood north of the house. In front of the house and to the south and west were scattered trees in the house yard. The gravel road, at the intersection, was a little higher than the pavement and as one traveled north, the grade was up.

Glen Morris, the defendant, had lived all his life within ten miles of the place in question. It appears from the evidence that he had driven by this intersection within a short time prior to the collision. On the evening of the collision the five occupants of the car, all of whom lived in the city of Washington in Tazewell County, had started out from Washington to attend a church meeting at Lilly, which was southeast of Washington. They left Washington at about seven-thirty, with the defendant and his wife in the front seat, the defendant's sister, the plaintiff, and Ben Smith in the rear seat. After driving about eight miles, they passed the Deer Creek corner which

There is a school house at the southeast corner of the intersection. On the northeast corner of the intersection was a grove of catalpa trees which extended north about two hundred feet on the west side of the gravel road. These, with some other trees, came up to the fence line. Some of the branches hung over the fence and extended to within six feet from the ground. On the west side of the gravel road, at this point, there was a ditch. On the west side of the ditch and about five and one-half feet from the west fence there was a 'stop' sign, a short distance north of the concrete. This sign was about four feet high from the level of the gravel. On the northeast corner of the intersection was a set of two buildings known as the O'Brien house. The house was about one hundred feet north of the road, and one hundred feet south of the east of the gravel road. There was a porch and a walk that stood north of the house. In front of the house and to the south and west were scattered trees in the house yard. The gravel road, at the intersection, was a little higher than the pavement and on the gravel road, the grade was up.

John Smith, the defendant, had lived all his life within ten miles of the place in question. It appears from the evidence that he had driven by this intersection within a short time prior to the collision. On the evening of the collision the two occupants of the car, all of whom lived in the city of Washington in Franklin County, had stated one from Washington to attend a church meeting at Billy, which was southeast of Washington. They left Washington at about seven-thirty, with the defendant and his wife in the front seat, and defendant's sister, the plaintiff, and her mother in the rear seat. About fifteen

3.

was one mile north from the Chaffer Corner. After leaving this corner, defendant testified that he started looking for the hard road.

Plaintiff offered evidence to the effect that at the time they reached the Deer Creek corner, defendant's wife said to defendant 'they would soon be coming to the hard road'. There is also evidence that at a point thirty-five feet from the hard road, defendant's wife exclaimed: "Oh my God there is the hard road." This evidence was contradicted by the defendant and his wife.

The proof discloses that the defendant, at the time he entered the intersection, was traveling at about thirty-five to forty miles an hour; that he didn't see the car coming from the east until he was up to the intersection; that he put his brakes on but by that time his front wheel was on the slab on the north side of the black line, and that he then released the brakes and accelerated the speed of his car in order to clear. The other car caught him <sup>car</sup> near the rear.

Plaintiff contends that they have established willful and wanton conduct by the fact that the defendant drove through a stop sign across the intersection of a paved U.S. highway that he knew existed, and was heavily traveled, particularly on the Sunday following Decoration Day (this being a highway that connected Bloomington, Illinois to Peoria, Illinois) at a speed of forty miles an hour; that he was familiar with both the gravel road and the hard road and had knowledge and notice of all the surrounding circumstances, hav<sup>ing</sup> passed this corner within a month prior to the time in question; that when he left Deer Creek corner



are one mile north from the corner. After leaving  
this corner, defendant testified that he started looking  
for the road.

Defendant offered evidence to the effect that at  
the time they reached the West Street corner, defendant's  
wife said to defendant "they would soon be going to the  
back road". There is also evidence that at about thirty-  
five feet from the road, defendant's wife exclaimed:  
"Oh my God there is the back road." This evidence was  
contradicted by the defendant and his wife.

The first objection that the defendant, at the  
time he entered the intersection, was traveling at about  
thirty-five to forty miles an hour; that he didn't see the  
car coming from the east until he was up to the intersection;  
that he put his brakes on but he didn't stop until he was  
on the side of the north side of the back street, and that  
he then released the brakes and accelerated the speed of his  
car in order to clear. The other car came from the  
west.

Defendant contends that they have established  
willful and wanton conduct by the fact that the defendant  
drove through a stop sign under the impression of a heavy  
E. St. highway that he knew existed, and was heavily traveled,  
particularly as the busier following defendant says (this  
being a highway that connects Elmhurst, Illinois to  
Naperville, Illinois) at a speed of forty miles an hour; that  
he was familiar with both the gravel road and the back road  
and his knowledge and belief of all the surrounding circum-  
stances, have placed him in a position to  
at that time in question; that when he left West Street corner

he knew the hard road was within a mile and that he was driving with his 'dims' rather than his 'brights'; that he neither looked to the right or the left as he came up to the hard road; that he didn't look for cars until his front wheels were actually on the slab; that he did not see the stop sign; that he did not slacken his speed even though he knew he was close to the paved road; that he failed to observe the 'wing-out' at the intersection of the slab, and that he failed to see the white School House at the intersection.

The defendant contends that plaintiff failed to make out a case of willful and wanton conduct on account of the elevation of the gravel in relation to the hard road; that defendant did not see the pavement in time; that on account of the grove of trees a shadow was cast so that he did not see the stop sign; and that on his left-hand side the set of buildings, trees and shrubs around the farm house shut off his view of the approaching Simmons car.

Under our statute a guest cannot establish a cause of action for personal injuries unless such accident shall have been caused by willful and wanton misconduct of the driver in the operation of the car. Ill. Rev. Stats 1937, Ch. 95 $\frac{1}{2}$ , section 58a.

In many cases an attempt has been made to define accurately the difference between ordinary negligence and willful and wanton misconduct. It is a very difficult thing to do. The more recent cases have been content with the statement that whether an act is willful and wanton depends on the particular circumstances of each case.

he knew the road was filled with traffic and that he was driving with his "blind" vision. He did not see the car on the right or the left or the fact that he was on the road; that he did not look for any car until the front wheels were actually on the road; that he did not see the stop sign; that he did not observe the speed limit; that he knew he was going on the wrong road; that he failed to observe the "blind" vision; that he failed to see the white road; that he failed to see the intersection.

The defendant contends that plaintiff failed to take out a case of William and Weston content in account of the elevation of the travel in relation to the hard road; that defendant did not see the pavement in time; that on account of the grade of the road a car was cast so that he did not see the stop sign; and that on his left-hand side the set of buildings, trees and signs around the farm house and off the view of the approaching diamond car.

Under our statute a party cannot establish a cause of action for personal injuries unless such accident shall have been caused by William and Weston defendant of the driver in the operation of the car. Ill. Rev. Stat. 1937, Ch. 95, section 35.

In many cases an attempt has been made to define accurately the difference between ordinary negligence and willful and wanton conduct. It is a very difficult thing to do. The more recent cases have been content with the statement that whether or not it is willful and wanton depends on the particular circumstances of each case.



In *Bernier v. Illinois Central R.R. Co.*, 296 Ill. 464, the Court said: "It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness or wantonness." In *Bremer v. L. E. & W. R.R. Co.*, 318 Ill. 11, it was said: "What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement." However, the decided cases seem to agree that one of the factors distinguishing a wilful and wanton act is, such absence of care for the person of another as exhibits a conscious indifference to consequences. *Farley v. Mitchell*, 282 Ill. App. 555.

In the case of *Murphy v. King*, 284 Ill. App. 74, it is stated: "An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make a case of constructive or legal wilfulness."

Section 167 of Ch. 95 $\frac{1}{2}$  Ill. Rev. Stats, provides that the Department may in its discretion and when traffic conditions warrant such action give preference to traffic upon any of the State highways under its jurisdiction, upon which has been constructed a durable hard-surfaced road over



traffic crossing or entering such highway by erecting appropriate stop signs and in such case vehicles entering upon or crossing such highway shall come to a full stop as near the right-of-way line of such highway as possible and regardless of direction shall give the right-of-way to vehicles upon such highway.

It is a matter of common knowledge that the public use the state roads so as to create a heavy travel condition and one coming on a state road is charged with notice of the probability of the presence of through traffic traveling at a high rate of speed and having the right of way over intersecting travel, and he is required to exercise a higher degree of care than is required at places less frequently traveled. His entering a state route without stopping and without ascertaining whether or not there is approaching cars from either direction may be such an act that under the particular circumstances of the case be so reckless as to warrant a jury in finding a total disregard for life or a general disposition to do injury. *Gavurnik v. Miller*, 283 Ill. App. 472; *Heidenreich v. Bremner*, 260 Ill. 439; *Neice v. Chicago & Alton R. R. Co.*, 254 Ill. 595; *McCarty v. Yates & Co., Inc.*, 294 Ill. App. 474.

The evidence alone, offered by the plaintiff, would justify an inference of such a reckless disregard of the safety of the persons in the car, as well as those on the state highway, as would amount to wanton and willful misconduct. On that ground the court did not err in submitting the issue to the jury.

There was a conflict in the evidence on the question of whether the branches of the trees that hung over



traffic crossing or entering such highway by creating appropriate stop signs and in some cases vehicles entering upon or crossing such highway shall come to a full stop as near the right-of-way line of such highway as possible and maintain a direction until the right-of-way to vehicles upon such highway.

It is a matter of common knowledge that the public use the state roads as to create a heavy travel condition and one coming on a state road is expected with notice of the probability of the presence of increased traffic traveling at a high rate of speed and having the right of way over faster

moving travel, and as is required to exercise a higher degree of care than is required at places less frequently traveled. In entering a state road without stopping and without ascertaining whether or not there is approaching cars from either direction it is held that the driver is negligent under the particular circumstances of the case as to require as to require a jury in finding a total disregard for life or a general disposition to do injury. *Carver v. Miller*, 283 Ill. App. 472; *Weidenreich v. Brenner*, 260 Ill. App. 419; *Neice v. Chicago & Alton R. Co.*, 324 Ill. 352; *McHenry v. Yates & Co., Inc.*, 324 Ill. App. 474.

The evidence alone, offered by the plaintiff, would justify an inference of such a reckless disregard of the safety of the persons in the car, as well as those on the state highway, as would amount to wanton and willful misconduct. On that ground the court did not err in submitting the issue to the jury.

There was a conflict in the evidence on the question of whether the presence of the trees that hung over

the fence, on the west side of the gravel road interfered with the vision of one approaching the hard road from the north. A number of plaintiff's witnesses testified that these branches did not obstruct the view of the 'stop sign' at the corner, and the weight of evidence seems to establish that the lowest of any of the branches was six feet from the ground while the 'stop sign' was four feet from the ground.

The evidence discloses that it was dusk and the Simmons car approaching the intersection from the east on the hard road had its headlights on; also that the defendant had his dimmers on. It further appears from the greater weight of the evidence that although the set of buildings were a partial obstruction to the view from the east, there were open spaces between the several buildings so that the defendant could see the hard road for a distance east of the intersection, had he looked.

The theory of the defense might apply if the defendant was driving in a strange community and making his first trip, then the recklessness of entering a paved road, without stopping or ascertaining what traffic was approaching, might be excused on the ground that he didn't have an opportunity to know the pavement was there, and that the circumstances were such as not to put him upon notice, but this theory is hardly tenable on this record, where under defendant's own testimony he knew that the pavement was within a mile after reaching the Deer Creek corner, and that he started watching for it. It further appears that he passed this intersection about three weeks prior to the day in question.

It is hard to visualize a more reckless attitude than the one of an automobile driver pulling on to one of the

the fence, on the west side of the gravel road intersecting with the view of the approaching car and road from the north. A number of witnesses testified that these branches did not obstruct the view of the 'stop sign' at the corner, and the weight of evidence seems to establish that the forest of any of the branches was six feet from the ground while the 'stop sign' was four feet from the ground.

The evidence discloses that it was dark and the witness can appreciate the intersection from the road on the hard road and the buildings on; also that the defendant had his lights on. It further appears that the greater weight of the evidence that although the set of buildings were a partial obstruction to the view from the east, there were open spaces between the several buildings so that the defendant could see the hard road for a distance east of the intersection, had he looked.

The theory of the defense is that if the defendant was driving in a state of emergency and taking his first trip, then the recklessness of entering a paved road, without stopping or ascertaining what traffic was approaching, might be excused on the ground that he might have an opportunity to know the pavement was there, and that the circumstances were such as not to put him upon notice, but this theory is hardly tenable on this record, where under defendant's own testimony he knew that the pavement was there and after reaching the Deer Creek corner, and that he was waiting for it. It further appears that he passed this intersection about three weeks prior to the day in question.

It is hard to visualize a more reckless attitude than the one of an automobile driver driving on to one of the



paved state roads that is known to be heavily traveled, with fast moving traffic that has the right of way, without first stopping and ascertaining the approach of traffic from each way. The peril to himself and to the life and limb of others is great. Conduct that may amount to mere negligence at ordinary intersections may be converted into wanton and willful misconduct by reason of these highly dangerous factors that necessarily accompany traffic conditions at intersections with state paved roads.

Ill-will is not a necessary element of a wanton act. To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care with the consequences of a willful injury. *Jeneary v. C. & I. Traction Co.*, 306 Ill. 392.

Complaint is made on the ruling of the trial court on the limitations of cross examination of two of the witnesses, also on the giving and refusing of instructions. We do not find anything of such serious nature in this connection as to require a reversal, neither can we hold on this record that the finding and verdict of the jury was against the manifest weight of the evidence. There is no error appearing in this record which justifies

proved state roads that is known to be heavily traveled, with  
fast moving traffic that has the right of way, without first  
stopping and ascertaining the approach of traffic from each  
way. The peril to himself and to the life and limb of  
others is great. Granted that any attempt to erect negligence  
as ordinary interaction may be viewed into action and  
will be dismissed by reason of these highly dangerous  
factors that necessarily accompany traffic conditions in  
interactions with state paved roads.

It will be not a necessary element of a motion  
act. To constitute a motion act the party doing the act or  
failing to act must be conscious of his conduct, and, though  
having no intent to injure, must be negligent, from his  
negligence of surrounding circumstances and existing conditions,  
that his conduct will necessarily and probably result in injury.  
An intentional disregard of a known duty necessary to the  
safety of the person or property of another, and an active  
presence of care for the life, person or property of others,  
such as exhibits a conscious indifference to consequences,  
makes a case of constructive or legal willfulness, such as  
charges the person whose duty it was to exercise care with  
the consequences of a willful injury. *Jennery v. E. & I.*  
*Traction Co., 206 Ill. 382.*

Complaint is made on the trial of the trial  
court on the limitation of cross examination of two of  
the witnesses, also on the giving and refusing of instructions.  
We do not find anything of such serious nature in  
this connection as to require a reversal, neither can we  
hold on this record that the ruling and verdict of the  
jury was against the manifest weight of the evidence.  
There is no error appearing in this record which justifies

a reversal of the judgment.

For the reasons given herein the judgment of the  
Circuit Court is affirmed.

JUDGMENT AFFIRMED.



a reversal of the judgment.

for the reason given above the judgment of the

direct court is affirmed.

THOMAS REINHOLD.

Abstract

314 I.A. 377<sup>1</sup>

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

FEBRUARY  
October Term, A.D. 1946

Gen. No. 9301.

Agenda No. 6.

P.M. McConathy,  
Plaintiff-Appellee,

-vs-

W.L. McConathy as Executor of  
the Last Will and Testament  
of Mary J. McConathy, deceased,  
and as Administrator pro tem  
of Mary J. McConathy, deceased,  
Defendant-Appellant.

Appeal from

Circuit Court

Montgomery County.

Fulton J:

On March 1, 1938, Appellee filed a claim for \$632.05, against the Estate of his mother Mary J. McConathy in the Probate Court of Montgomery County. The claim consisted of two items. Claim No. 1, was for \$150.00 for services rendered his mother in looking after her farm for the last three years prior to her death. Claim No. 2, was for a real estate commission paid by Appellee for the sale of his Mothers farm and expenses amounting to \$482.05. The County Court allowed the claim for \$150.00, and disallowed the balance. The Appellant appealed to the Circuit Court from the order allowing the \$150.00 claim and the Appellee appealed from the order disallowing the balance. In the Circuit Court the appeals were consolidated and heard together. After proofs were taken judgment was entered in favor of the Appellee for the full amount of both claims in the sum of \$632.05. It is from that judgment that Appellant brings an appeal to this Court.

Extract

3111A.877

STATE OF ILLINOIS  
CLERK OF THE  
COURT

February 1, 1930

March 1, 1930

Gen. No. 9300

W.L. McGonigley,  
Plaintiff-Defendant,

-vs-

W.L. McGonigley as executor of  
the last will and testament  
of Mary J. McGonigley, deceased,  
and as administrator of the  
estate of Mary J. McGonigley, deceased,  
Defendant-Plaintiff.

Comes now

Plaintiff

Montgomery County

Plaintiff

On March 1, 1928, Plaintiff filed a claim for \$100.00 against the estate of his mother Mary J. McGonigley in the Probate Court of Montgomery County. The claim consisted of two items. Claim No. 1, was for \$100.00 for services rendered his mother in looking after her for the last three years prior to her death. Claim No. 2, was for a real estate commission paid by Plaintiff for the sale of his mother's farm and expenses amounting to \$400.00. The County Court allowed the claim for \$100.00, and disallowed the balance. The Plaintiff appealed to the Circuit Court from the above allowing the \$100.00 claim and the Appellate Court from the order disallowing the balance. In the Circuit Court the appeals were consolidated and heard together. After proofs were taken judgment was entered in favor of the Plaintiff for the full amount of both claims in the sum of \$500.00. It is this Court's judgment that Plaintiff be allowed an appeal to this Court.



A claimant against an estate to which objection is made has the burden of establishing his claim. *Crandall v. The Carey Lombard Lumber Co.* 164 Ill.474. In this case the claimant was a son of the decedent.

In support of Claim No. 1, Plaintiff introduced in evidence a Power of Attorney from his Mother authorizing him to have control over her 100 acre farm giving him authority to rent the same, collect the rents, keep it insured, repaired, etc. He further submitted oral testimony as to the value of similar services being \$50.00 per year. There is no evidence, however, either as a part of the Power of Attorney or in the oral proof of any contract, either express or implied, covering compensation for the management of said farm.

In *Vogel v. Murphy, Executor*, 182 Ill.App.631, the rule covering such services is announced as follows:

"Where services are rendered by or to one admitted into the family as a relative, the presumption of law is that such services are gratuitous, and that the parties do not contemplate payment therefor. But this presumption may be overcome by proof, either of an express contract or of facts and circumstances which show that both parties, at the time the services were rendered, intended pecuniary recompense, other than that which arises naturally out of the family relation." Citing *Heffron v. Brown*, 155 Ill.322.

In *Moreen v. The Estate of Carlson*, 365 Ill.482, the Court said that in such cases it was only required that claimant produce sufficient evidence of a contract, express or implied to negative any presumption that the services were gratuitously performed. We do not feel that claimant has met that test in support of his Claim No. 1.

A claimant against an estate in which objection is made has the burden of establishing his claim. *Grinnell v. The City of London*, 100 Cal. 111. In this case the claimant was a son of the decedent.

In support of Claim No. 1, Plaintiff introduced in evidence a power of attorney from the mother authorizing him to have control over her 100 acre farm giving him authority to rent the same, collect the rents, keep it insured, etc. He further submitted oral testimony as to the value of similar services being \$25.00 per year. There is no evidence, however, either as a part of the power of attorney or in the oral proof of any contract, either express or implied, covering compensation for the management of said farm.

In *Yorke v. Morley*, 102 Cal. 111, the wife covering claim is answered as follows:

"Where services are rendered by one to another in the family as a relative, the presumption of law is that such services are gratuitous, and that the parties to such relationship may be overcome by proof, either of an express contract or of facts and circumstances which show that such services, at the time the services were rendered, were rendered generally gratuitous, other than that which arises naturally out of the family relation." *Citing Hoffman v. Brown*, 102 Cal. 111.

In *Hoffman v. The Estate of Carlson*, 102 Cal. 111, the Court said that in such cases it was only required that claimant produce sufficient evidence of a contract, express or implied to negative any presumption that the services were gratuitously performed. We do not feel that claimant has met this test in support of his claim No. 1.

In support of Claim No. 2, for "Real estate commission paid for the sale of the land and expenses", the Appellee offered in evidence the same general Power of Attorney to act as Agent, which was dated in April, 1933, and a contract between Appellee and a real estate agent, W.J.England, to sell his Mothers farm, dated December 24, 1936. Also an oral stipulation which stated that on May 11, 1937, one William J. England obtained judgment in a Police Court against Appellee for \$450.00, and costs and that the subject matter of the suit was for real estate commissions for sale of the Mary J. McConathy farm; that Appellee had paid the said judgment and costs amounting to \$482.05.

The files in the Mary J. McConathy estate show that she died on January 28, 1937. The testimony does not disclose any fact tending to show that the sale of the farm was made before or after that date. The rule of law is well established that the death of a principal terminates the agency in the absence of circumstances giving the agent any authority coupled with an interest. There is no such interest shown in Appellee as to make his agency irrevocable. Levy v. Wilmes 239 Ill.App. 229.

The fact that the contract to sell given the real estate broker England, is for a definite period, which at the time of death has not yet expired, does not vary this rule. If the sale was made before the death of the Mother, that fact should have been definitely shown in the proof together with other facts and circumstances surrounding the sale. Burden of proving claim against estate of decedent is upon claimant whose evidence will be scrutinized with great care by the court. In Re: Estate of Teehan, 287 Ill.App. 58.



[illegible]

The first in the New York J. McGowan estate was that the  
 died on January 26, 1937. The bequest was not a bequest of  
 trust resulting in such that the sale of the land was not  
 or after that date. The sale of the land is well established that  
 the date of a certain estate was the date in the estate  
 of circumstances giving the estate and authority coupled with  
 an interest. There is no such interest shown in the estate as  
 in the estate of McGowan. (New York J. McGowan)

The fact that the apartment is well given and well situated  
between England, is for a definite period, under the same  
of which has not yet expired, does not mean that it  
the sale was made before the death of the husband, that that  
should have been taken into account in the good husband's will  
which was and otherwise provided for the wife's support  
of living and against estate of husband is not sufficient  
that evidence will be admitted that none of the  
court in the State of Texas, DRY L. A. No. 25.

Because the testimony in support of both claims one and two is lacking in essential elements necessary to sustain the judgment of the Circuit Court and because there is a possibility that competent and convincing evidence is available, the said judgment is reversed and the cause remanded to the Circuit Court of Montgomery County for a new trial.

REVERSED and REMANDED.

THE UNIVERSITY OF CHICAGO

and two is lacking in essential elements necessary to sustain the judgment of the Circuit Court and hence is reversed. It is possible that material and convincing evidence is available, the said judgment is reversed and the cause remanded to the Circuit Court of Montgomery County for a new trial.



314 I.A. 377<sup>2</sup>

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

FEBRUARY  
October Term, A.D. 1941.

Gen. No. 9313.

Agenda No. 15.

James A. Huddleston, )  
Plaintiff-Appellee, )  
-vs- )  
S.B. Ebert, )  
Defendant-Appellant. )

Appeal from  
Circuit Court  
Sangamon County.

Fulton J:

On January 8, 1941, the Appellant listed his 12 acre farm for sale with Appellee, the agreement being set forth in writing and signed by both parties. On February 26, 1941, the Appellee entered into an agreement with one D.O. Christy to sell the land at the price and in accord with the terms set out in the original sales agreement. When notified of the sale, Appellant refused to perform and rescinded his contract.

Appellee brought suit in a Justice Court against the Appellant and recovered a judgment in the sum of \$60.00. On appeal to the Circuit Court, the case was tried before a jury who returned a verdict for the same amount in favor of Appellee, and it is from a judgment on this verdict that Appellant appeals to this Court.

DECEMBER

3141A.387

STATE OF ILLINOIS  
COURT OF APPEALS  
FIRST JUDICIAL DISTRICT

February 2, 1921  
Circuit Court, 1st District

James H. Ballister

Gen. No. 2213

James H. Ballister,  
Appellant-Defendant,  
vs.  
C.B. Ebert,  
Defendant-Appellant.

Appellant from  
Circuit Court  
Madison County.

Exhibit 1:

On January 2, 1921, the appellant stated his intention to sell the premises to the appellee, the agreement being set forth in writing and signed by both parties. On February 26, 1921, the appellee entered into an agreement with the D.A. (Deputy Assessor) to sell the land at the price and in accord with the terms set out in the original sales agreement. When notified of the sale, appellant refused to perform and rescinded the contract.

Appellee brought suit in a Justice Court against the appellant and recovered a judgment in the sum of \$50.00. On appeal to the Circuit Court, the case was tried before a jury who returned a verdict for the same amount in favor of appellee, and in its final judgment on this verdict that appellee should be paid the said sum.

The questions of law raised by Appellant on this record are without merit, and the questions of fact have all been passed upon adversely to Appellant. First, by a Justice of the Peace, where judgment for \$60.00, was rendered against him, second, by the verdict of a jury in the Circuit Court of Sangamon County for the same amount and third, by the denial of a motion for a directed verdict and the overruling of a motion for a new trial by a very able and learned trial Court. In passing upon this case he punctuated his remarks by some very positive and definite statements with all of which we are in accord.

While we believe thoroughly in allowing every party his day in court, if possible, we do not feel like encouraging continuous appeals over trivial amounts and questions of small moment.

In any event, we do not find that the verdict of the jury was against the manifest weight of the evidence, and therefore, would not be justified in reversing the judgment on that ground. There is sufficient evidence in the record to sustain the verdict of the jury and the judgment of the Circuit Court is affirmed.

AFFIRMED.



[illegible]

While we believe thoroughly in all that every body has  
has to say, it is not, we do not feel like recognizing  
conditions which are not really conditions of

In my view, we do not have the evidence at the moment  
to justify the continued weight of the evidence, and therefore,  
would not be justified in treating the Government as they would.

There is sufficient evidence in the record to establish the

1915

Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

FEBRUARY  
October Term, A. D., 194<sup>2</sup><sub>7</sub>.

General No. 9310.

Agenda No. 14.

JOHN KOCH, )  
Plaintiff Appellee, )  
-vs- )  
CLARA BARKER, )  
Defendant Appellant. )

Appeal from  
Circuit Court,  
Tazewell County.

314 I.A. 378

RIESS, J.:

John Koch, plaintiff appellee herein, filed a suit at law in the Circuit Court of Tazewell County on November 24, 1939, seeking recovery of damages for personal injuries and financial loss resulting from the alleged negligent driving and operation by defendant appellant, Clara Barker, of her automobile on August 8, 1938. Trial by jury resulted in a verdict against the defendant in the sum of \$13,500, upon which judgment in favor of the plaintiff was entered after defendant's motions for directed verdicts, judgment notwithstanding the verdict and to set aside the verdict and grant a new trial had been denied by the Trial Court. This appeal then followed.

The complaint consisted of four counts wherein it was alleged that the plaintiff, while in the exercise of due care for his own safety, was injured as the direct and proximate result of defendant's general negligence; negligent failure to drive her automobile under safe and proper control; driving with brakes inadequate to stop her automobile and while the brakes were not in good working order. Defendant, by

AD-1501

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

FILED  
CLERK OF COURT  
JAN 10 1938

Case No. 1-1

General No. 2110

APPEAL FROM  
CIRCUIT COURT,  
THIRD DISTRICT

3141A.378

{ JAMES KOOB,  
{ Plaintiff Appellant,  
{  
{ -vs-  
{  
{ CLARA BARKER,  
{ Defendant Appellant.

FILED, 3-1

John Koob, Plaintiff appellee herein, filed a suit at law in the Circuit Court of Tazewell County on November 24, 1935, seeking recovery of damages for personal injuries and financial loss resulting from the alleged negligent driving and operation by defendant appellant, Clara Barker, of her automobile on August 9, 1935. Trial by jury resulted in a verdict against the defendant in the sum of \$12,500, upon which judgment in favor of the plaintiff was entered after defendant's motion for directed verdict, judgment notwithstanding the verdict and to set aside the verdict and grant a new trial had been denied by the trial court. This appeal then followed.

The complaint consisted of four counts wherein it was alleged that the plaintiff, while in the exercise of due care for his own safety, was injured as the direct and proximate result of defendant's general negligence; negligent failure to drive her automobile under safe and proper control; driving with brakes inadequate to stop her automobile and while the brakes were not in good working order. Defendant, by



her answer, denied that the plaintiff was in the exercise of ordinary care and denied all charges of negligence by her.

Defendant appellant, in her assignment of errors and argument, contends that the plaintiff failed to prove that he was in the exercise of ordinary care and caution for his own safety or that his injuries were proximately caused by negligence on the part of the defendant; that the Court erred in admitting certain evidence over defendant's objection; in overruling motions for a directed verdict for defendant at the close of plaintiff's evidence and of all the evidence; in refusing certain of defendant's instructions and in denying motions for judgment non obstante veredicto, for new trial, and in entering judgment on the verdict. Defendant further contends that the amount of the verdict is grossly excessive and was the result of sympathy, passion, prejudice and improper argument of plaintiff's counsel.

Plaintiff Koch, age seventy one years, a bridge tender on an Illinois River bridge extending between Peoria and East Peoria, Illinois, was struck and injured at about 3:10 in the afternoon of August 8, 1938, while engaged in closing an iron latticed gate of a length of twenty six feet by five and a half feet in height extending across the driveway of said bridge, in order to raise and open the seventy three foot span of a lift or jackknife bridge to permit the passage of a steamboat then approaching the bridge from a northerly direction.

Plaintiff's witness Clifford testified in substance that he was a bridge tender on this bridge since 1937; that he went off duty and was succeeded by plaintiff Koch at 2:30 P. M. on the day of plaintiff's injury; that their duties were similar and included handling the bridge for vehicular and boat traffic over and through the same; that to handle traffic it was necessary for the bridge tender in charge to first close the east gate on the East Peoria or Tazewell County side of the bridge, then proceed to the westerly portion and close two gates each extending to the middle of the

her answer, denied that the plaintiff was in the exercise of ordinary care and denied all charges of negligence by her.

Defendant's motion, in her statement of error and argument, contends that the plaintiff failed to prove that he was in the exercise of ordinary care and caution for his own safety or that his injuries were proximately caused by negligence on the part of the defendant; that the Court erred in admitting certain evidence over defendant's objection; in overruling motions for a directed verdict and defendant's motion for judgment on the verdict. Defendant further contends that the amount of the verdict is grossly excessive and was the result of passion, prejudice and improper argument of plaintiff's counsel.

Plaintiff Koch, now seventy-one years of age, a single tender on an Illinois River bridge, was struck and injured at about 3:10 in the afternoon of August 8, 1937, while engaged in closing an iron latticed gate of a length of twenty-six feet by five and a half feet in width extending across the driveway of said bridge, in order to raise and open the seventy-three foot span of a lift or Jackknife bridge to permit the passage of a steamboat then approaching the bridge from a northerly direction.

Plaintiff's witness Clifford testified in substance that he was a bridge tender on this bridge since 1937; that he went off duty and was succeeded by plaintiff Koch at 8:30 P. M. on the day of plaintiff's injury; that their duties were similar and included handling the bridge for vehicular and boat traffic over and around the same; that to handle traffic it was necessary for the bridge tender in charge to first close the east gate on the East Peoria or Lincoln County side of the bridge, then proceed to the nearby portion and close two gates each extending to the middle of the

bridge on the westerly or Peoria side; then return and open the east gate and permit vehicular traffic which had accumulated on the lift portion of the bridge to proceed eastwardly; then close this gate, leaving the lift portion between the gates free of vehicles, and go into the control house on the northerly side of the bridge near the east gate and throw the switches to raise the bridge and permit passage of the boat.

Plaintiff Koch testified that a short time prior to closing the east gate of the bridge, he had received a whistle signal of the approach of a boat from the north and had turned on a siren to notify the boat captain that his signal had been heard, which siren can be heard at a distance of a thousand feet. Plaintiff then turned on the switch on the stop light and on two red lights located on the gate, all acting on the same switch; that he then picked up a red flag and proceeded from the control house and swung the hinged gate on the East Peoria side across the highway and latched it to a girder on the south side of the bridge. The bridge, gates, lift and highway across the same are shown by photographs and scale maps exhibited and admitted in evidence.

Plaintiff testified that the red lights on the east gate were in good condition and in operation; that he proceeded to close the gate while holding the red flag in his right hand on top of the gate and the handle of the catch on the end of the gate in his left hand, thus proceeding across the bridge. He permitted two automobiles going at a speed of about five miles per hour to pass and observed that there was no other traffic on the bridge; that he closed and latched the gate to a girder on the southerly side of the bridge; that it was necessary to watch and properly latch the handle into the slot located on the girder; that during this time the red flag was displayed in his right hand on top of the gate in full view of any approaching traffic; that he latched the gate and proceeded to step away at the moment that defendant's



bridge on the western or Pacific side; then return and open the east gate and permit vehicular traffic which had accumulated on the life portion of the bridge to proceed eastwardly; then close this gate, leaving the life portion between the gates free of vehicles, and go into the control house on the northerly side of the bridge near the east gate and throw the switches to raise the bridge and permit passage of the boat.

Plaintiff took testimony that a short time prior to closing the east gate of the bridge, he had received a whistle signal of the approach of a boat from the north and had turned on a light to notify the boat captain that his signal had been heard, which often can be heard at a distance of a thousand feet. Plaintiff then turned on the switch on the stop light and on two red lights located on the gate, all acting on the same switch; that he then picked up a red flag and proceeded from the control house and swung the hind gate on the East Pacific side across the highway and latched it to a girder on the south side of the bridge. The bridge, gates, lift and highway across the same are shown by photographs and scale maps exhibited and admitted in evidence.

Plaintiff testified that the red lights on the east gate were in good condition and in operation; that he proceeded to close the gate while holding the red flag in his right hand and on top of the gate and the handle of the catch on the end of the gate in his left hand, the speed across the bridge. He permitted two automobiles going at a speed of about five miles per hour to pass and observed that there was no other traffic on the bridge; that he closed and latched the gate to a girder on the southerly side of the bridge; that it was necessary to watch and properly latch the handle into the slot located on the girder; that during this time the red flag was displayed in his right hand on top of the gate in full view of any approaching traffic; that he latched the gate and proceeded to step away at the moment that defendant's

automobile crashed through the gate without having sounded any horn or signal of its approach; that he was struck by the gate and thrown eastward twelve to fifteen feet along the girder on the southerly side of the bridge; that he took hold of his leg and pulled it out of the road with the bone protruding through his boot; that he was struck and cut in his head and nose; his shoulder injured and that he was taken to the hospital.

The X-rays and physician's testimony showed that both the tibia and fibula of his right leg were broken through and shattered transversely in the upper third thereof and were overlapping; that he sustained great pain and suffering, followed by pneumonia; that the protruding bone was replaced and the fractured leg reduced and placed in a plaster cast from the hip to the toes and his scalp injuries sutured; that at intervals of two or three months, the casts were removed and X-rays taken on four occasions; that when the second cast was applied in October following the injury in August there was no union in the leg and the bone fragments were still moveable; that he could not walk and was obliged to move about with assistance on two crutches; that on December 3, 1938, X-rays again were taken showing some bone formation but no complete healing; that on February 18, 1939, X-ray examination and pictures showed more callous formation and slow healing; that on June 3, 1939, about ten months after the date of the injury, the bony fragments were in the same position and still showed motion in the fracture of the tibia; that the leg was still swollen in the injured area; that on March 13, 1941, two years and seven months after the injury, there was a bony union bridged across from the tibia to the fibula in an abnormal condition; that in the treating physician's opinion, based upon reasonable medical certainty, the plaintiff had reached his maximum state of improvement; that his injuries and present condition is permanent and that he is and will be unable to perform work of any kind; that he requires the use of two canes in walking and

accident occurred through the gate without having opened any door on either of its approach; that he was struck by the gate and thrown eastward twelve to fifteen feet along the gutter on the southerly side of the bridge; that he took hold of his leg and pulled it out of the road with the bone protruding through his boot; that he was struck and out in his head and nose; his shoulder injured and that he was taken to the hospital.

The X-rays and physician's testimony showed that both the tibia and fibula of his right leg were broken through and shattered transversely in the upper third thereof and were overlapping; that the protruding bone was retracted and the fractured leg reduced and placed in a plaster cast from the hip to the toes and his scalp injuries healed; that at intervals of two or three months, the casts were removed and X-rays taken on four occasions; that when the second cast was applied in October following the injury in August there was no union in the leg and the bone fragments were still movable; that he could not walk and was obliged to move about with assistance on two crutches; that on December 3, 1938, X-rays again were taken showing some bone formation but no complete healing; that on February 18, 1939, X-ray examination and pictures showed more callous formation and slow healing; that on June 3, 1939, about ten months after the date of the injury, the bony fragments were in the same position and still showed motion in the fracture of the tibia; that the leg was still swollen in the injured area; that on March 13, 1941, two years and seven months after the injury, there was a bony union bridged across from the tibia to the fibula in an abnormal condition; that in the treating physician's opinion, based upon reasonable medical certainty, the plaintiff had reached his maximum state of improvement; that his injuries and present condition is permanent and that he is and will be unable to perform work of any kind; that he requires the use of two canes in walking and



that pain and suffering still prevail, with limited motion of the knee and ankle joints. Plaintiff further testified that since his injury, his aches and pains awaken him or keep him awake at night; that prior to his accident, his general health had been good and that he had never suffered any previous injury; that he had actively engaged in hard work all his life and was reared and lived upon a farm until he became of age; that he has been unable to do work of any kind since his injury. The evidence further discloses that plaintiff's earnings were fifty dollars per month, working alternately two weeks per month at twenty five dollars per week, and had been so employed as a bridge tender for more than one year prior to his injury; that he sustained financial obligations of ambulance, physician and hospital bills aggregating in excess of eight hundred dollars in addition to loss of past and future wages resulting from the injury; It further so appears that the term of his expectancy of life approximates ten years. At the time of the injury, witnesses testified that defendant's car was approaching at speeds variously estimated from fifteen to thirty miles an hour; that it was raining; that the wooden floor of the bridge was wet and slippery; that on the bridge approach, stop signs, red light signs and a sign reading "Slow - Slippery When Wet" were in plain view and their presence was known to the defendant; that she had crossed this bridge on many occasions during her thirty years practice of osteopathy in going between Peoria and her home in Eureka, Illinois.

Defendant appellant, Clara Barker, was cross examined by plaintiff's counsel under Section 60 of the Civil Practice Act and also testified in her own behalf, together with certain other defendant's witnesses. She testified in substance that both she and her husband were licensed osteopathic physicians and had practiced in Eureka, Illinois, for thirty two years; that she occasionally drove to Peoria and on many occasions travelled over the Franklin Street bridge; knew it was a lift bridge and had seen it lifted and that it was lifted to

that he was suffering still greater, with limited motion of the hand and wrist joints. Plaintiff testified that at that time his injury, his hands and arms swollen and on his back at night; that before to his recollection, his General Family had been told and that he had never suffered any previous injury; that he had entirely recovered in fact and all his life and was removed and lived again a few months in hospital care; that he had been unable to do work of any kind since his injury. The evidence further disclosed that Plaintiff's earnings were fifty dollars per month, working twenty-two weeks per month at twenty-five dollars per month, and had been employed as a bridge tender for more than one year prior to his injury; that he sustained substantial obligations of maintenance, education and household bills aggregating in amount of eight hundred dollars in addition to loss of rent and repairs wages resulting from his injury. It further was apparent that the loss of his expectancy of life approximated ten years. At the time of the injury, witnesses testified that Defendant's car was approaching at speeds variously estimated from fifteen to thirty miles an hour; that it was raining; that the wooden floor of the bridge was wet and slippery; that on the bridge approach, stop signs, red light signs and a sign reading "Slow - Highway Crossed" were in plain view and clearly prominent; that the Defendant, that she had crossed this bridge on many occasions during her family's recent practice of crossing in going between Peoria and her home in Illinois, Illinois. Defendant testified, Clara Becker, was once mentioned by Plaintiff's counsel as being located on the South Frontage Road and also testified in her own behalf, together with certain other Defendant's witnesses. She testified in substance that both she and her husband were witness to the accident and that they were located in Peoria, Illinois, for thirty-two years; that she occasionally drove to Peoria and on many occasions traveled over the Franklin Street Bridge; that it was a lift bridge and had been so lifted and that it was lifted to

permit the passage of boats on the river; that the accident in question occurred shortly after three o'clock on the afternoon of August 8, 1938; that she had been to the City of Peoria, was on her way home and was travelling alone in the automobile; that it had rained hard all day and was drizzling when she approached the bridge from Peoria to East Peoria in an easterly direction; that there were signs along the side of the bridge; that Exhibit 3 is a stop sign shown on the picture which was there on that day in full view as she went over the bridge; that there was a sign on the right girder which said "Slow - Slippery When Wet" which was in full view as she crossed on that day; that she first saw Koch when at the crest of the lift bridge about one hundred feet west of the first girder toward Peoria; that he was then at the end of the gate and had started across the bridge with the gate when she saw him; that he must have been three feet out; that when her automobile came in contact with the gate, Koch was not entirely across; that the gate was open about two or three feet when she struck it, not closed at the time of impact; that she saw the gate move across the bridge but didn't observe Mr. Koch because he was behind the gate; that the gate was in clear view all that time; that when she saw it, she attempted to apply her brakes; was going about sixteen or seventeen miles an hour and the car slid; started to slide when about forty feet from the gate; struck the gate but not hard, car stopped where gate fastened on Peoria side of gate; after accident Koch was lying about four feet from where the gate would have closed about two feet from the curb and about six feet from her automobile and in path that car would have taken if it had gone on east; as soon as car stopped she got out and ran to Koch and a lady and a few others came up; that she didn't recall saying to an officer that she pushed both pedals to the floor but the car did not stop; didn't observe red flag in Koch's hand on top of gate; noticed something down at his side and later found it was a flag, but at time no flag was visible; heard him say after he had fallen "Someone wave



permitted the passage of boats on the river; that the accident in question occurred shortly after midnight, a block or two from the town of Peoria, 1935; that she had been to the City of Peoria, was on her way home and was travelling alone in the automobile; that it had rained hard all day and was still raining when she crossed the bridge from Peoria to Rock Island in an easterly direction; that there were signs along the side of the bridge; that Exhibit 3 is a stop sign shown on the picture which was there on that day in full view as she went over the bridge; that there was a sign on the right which said "Slow - Slippery When Wet" which was in full view as she crossed on that day; that she first saw Koch when at the crest of the lift bridge about one hundred feet west of the first girder toward Peoria; that he was then at the end of the gate and had started across the bridge with the gate when she saw him; that he must have been three feet out; that when her automobile was in contact with the gate, Koch was not entirely across; that the gate was open about two or three feet when she struck it, not closed at the time of impact; that she saw the gate move across the bridge but didn't observe Mr. Koch because he was behind the gate; that the gate was in clear view all that time; that when she saw it, she attempted to apply her brakes; was going about sixteen or seventeen miles an hour; and the car slid; started to slide when about forty feet from the gate; struck the gate but not hard, car stopped where gate fastened on Peoria side of gate; after accident Koch was lying about four feet from where the gate would have closed about two feet from the curb and about six feet from her automobile and in path that car would have taken if it had gone on east; as soon as car stopped she got out and ran to back and a lady and a few others came up; that she didn't recall saying to an officer that she pushed both pedals to the floor but the car did not stop; didn't observe red flag in Koch's hand on top of gate; noticed something down at his side and later found it was a flag, but at time no flag was visible; heard him say after he had fallen "Someone was

that flag to stop the boat;" that she then saw the flag; that she had  
proceeded to the on/bridge with several cars following but saw no cars ahead  
on south side of bridge; was looking ahead; heard no siren nor steam-  
boat whistle; saw no boat approaching from right or left; proceeded  
east on upgrade to top of jackknife bridge; at top level for a few  
feet and then eastward downgrade; was on right side of traffic lane;  
noticed gate starting to close with elderly gentleman handling it out  
at end of gate at latch and to left of center line of road about three  
quarters of the way over; noticed he was pulling gate forward and  
swung his hand with something that appeared to be a flag in it; there  
seemed to be a little color to it but was not unfurled; that she put  
on the brakes, the four wheels slid eastward toward gate coming on,  
but the man gradually got behind it; that the car continued to slide  
and the gate to come on; that she turned the car slightly to left to  
strike girder and avoid hitting gate, but was too late, so struck it.

On further cross examination, defendant stated that she knew  
it had been raining and bridge would be slippery; was in full view of  
east gate between seventy five and one hundred feet where gate latches  
when she reached top of grade; that she saw Koch when forty or forty  
five feet west of him, but did not see him one hundred feet away; that  
she applied the brakes but car continued sliding, when struck, about  
five miles per hour; that she did not sound the horn; that the gate  
was not solid, had spaces like lattice work you could see through; that  
it was possible it was her confusion that kept her from seeing Koch  
behind the gate; that she was watching her car; that she could not see  
from the crest of the bridge one hundred feet away; that the view from  
the crest to gate is clear and no obstruction to view in that one  
hundred feet, but she did not see Mr. Koch; that when she struck the  
gate, it eased back. It was within two or three feet of being closed  
when she hit it. She saw no one move her car from that location to a  
point one hundred feet east on south side of bridge. Mr. Koch was  
facing her when closing the gate, but when he got behind it, she did





not know whether or not he was facing her. After the accident there was a dirty red flag on the ground about six feet from the gate. Koch was lying along right curb four or five feet east of the first girder, and she observed no red lights on gate. It may be noted that material contradictions appear in the defendant's testimony.

Jesse Darling, of Eureka, testified to condition of the car.

Dudley Shepardson, of Tremont, aged eighteen, was present with his mother, Mrs. Shepardson, at time of collision. Other cars ahead of them. Saw collision and Koch on pavement. Took dark red flag rolled on stick and attempted to flag the boat. When first saw Mrs. Barker's car, it had stopped across roadway. He didn't see anyone move it. Next saw it on main span about one hundred feet to the east side, tight to curb. He heard no siren. Bridge was wet and oily. Oil or creosote on boards in addition to rain and was slick. Car ahead of me cut off view of Barker car. Did not see accident but heard boat whistle. Not know if red flag rolled up or if rolled up when thrown out of Koch's hand. Saw his head bleeding and something about his leg. Saw sign "Slow - Slippery When Wet." Car in front of me was a Model A Ford travelling about twenty five miles an hour. Went past place where Koch lay.

Edwin Mitchel testified that he lived in Pekin; measured gate; twenty eight feet from control house and five feet five inches above floor at curb on ends. Gate latches when closed. Curb at girder where gate latches when gate is closed is six and a half to seven inches high. Gate comes on top of curb. It is a latticed type metal gate. Framework made of three inch angle irons about a quarter of inch thick. Lattice is made of diagonal metal strips one and a fourth inches wide and a quarter inch thick. Travelled part of highway from hinged gate over to latched side practically even. Other witnesses testified to surrounding conditions corroborating in part testimony of respective parties.

From reading of the abstract and parts of the record, it appears that the questions of negligence and contributory negligence

not know whether or not he was looking out. After the accident there was a dip in the ground about the front of the car. It was lying along right about five feet east of the front bumper, and the observer to the left on the left. It may be noted that material contradictions appear in the defendant's testimony.

John Barker, of Newark, testified to condition of the car. Barker's testimony, of Newark, said Barker, was present with his mother, Mrs. Barker, at time of collision. Barker was seated in the car. Barker and Koch on the ground. Barker said that Barker's car and attempted to flee the scene. Barker said that Barker's car, it had stopped across roadway. He didn't see anyone move it. Next saw it on main open about one hundred feet to the west side, right to curb. He heard no alarm. Barker was wet and oily. Oil or grease on boards in addition to rain and was slick. Barker said of the car off view of Barker car. Did not see accident but heard front whistle. Not know if red flag rolled up or if rolled up when Barker out of Koch's hand. Saw his head bleeding and something about his leg. Saw sign "Slow - Slippery When Wet." Saw in front of car a Model A Ford travelling about twenty five miles an hour. Went past three times.

Koch said. Barker Mitchell testified that he lived in Newark; resided Gate twenty eight feet from control house and five feet five inches above floor at curb on edge. Gate latches when closed. Gate at Barker where gate latches when gate is closed is six and a half to seven inches high. Gate comes on top of curb. It is a lattice type metal gate. The lattice made of three inch angle iron about a quarter of inch thick. Lattice is made of diagonal metal strips one and a fourth inches wide and a quarter inch thick. Travelled part of highway from divided side when to latched side practically even. Other witnesses testified in surrounding conditions corroborating in part testimony of respective parties.

From reading of the abstract and parts of the record, it appears that the questions of negligence and contributory negligence

or want of due care at the time of the injury became questions of fact under the evidence. It appears that the plaintiff did not see the defendant's approaching car prior to the time of the collision, and this point is stressed strongly by defendant as such proof of contributory negligence on the part of the plaintiff as to preclude his recovery herein. We do not think so.

At the time that defendant's car skidded toward and into the gate which he was either in the act of closing or had just closed, plaintiff was behind the gate and was watching the latch. There is nothing in the evidence to show that he could have done anything to avoid being struck by the car as it crashed into the gate, whether he saw or did not see the defendant's car approaching or that there was anything that he could have done to avoid being struck at that time. On the other hand, defendant concedes that her view was open for one hundred feet after reaching the crest of the bridge with no obstructions ahead and that she could have seen him but did not see him until within about forty feet of the gate, when she says that she threw on the brakes and skidded into the gate which struck and injured the plaintiff, who was then behind the gate.

Defendant was familiar with this bridge and its operation; had frequently travelled it; knew of the wet condition of the bridge and was travelling in a manner as to not have control of her car. She seems not to have observed the flag, the man, the signals, the lights nor the gate nor to have heard either the siren or the boat whistle until she was so close to the gate as to be unable to stop her car at the speed she was travelling. Under the circumstances, we feel that there was ample evidence to justify the verdict of the jury both on the question of due care on the part of the plaintiff and of contributory negligence on the part of the defendant. We hold that under the evidence the Trial Court properly denied defendant's motions for directed verdicts and for judgment notwithstanding the verdict, and that under the motion for new trial, the verdict was not contrary to the manifest weight of



...of the fact that at the time of the injury, the defendant was not under the influence of any alcohol. It appears that the plaintiff did not see the defendant's car prior to the time of the collision, and this point is stressed strongly by the defendant as being proof of contributory negligence on the part of the plaintiff as to not seeing the recovery train. We do not think so.

At the time that defendant's car struck plaintiff and into the gate which he was either in the act of closing or had just closed, plaintiff was behind the gate and was watching the train. There is nothing in the evidence to show that he could have done anything to avoid being struck by the car as it crossed into the gate, whether he saw or did not see the defendant's car approaching or that there was anything that he could have done to avoid being struck at that time.

On the other hand, defendant concedes that his view was open for one hundred feet after reaching the crest of the bridge with no obstructions ahead and that he could have seen him and did not see him until within about forty feet of the gate, when she says that two times on the train and walked into the gate with the train and injured the plaintiff, who was then behind the gate.

Defendant was familiar with this bridge and its operation; had frequently travelled it; knew of the location of the bridge and was travelling in a manner as to not have control of the car. She seems not to have observed the flag, the sign, the signal, the lights nor the gate nor to have heard either the alarm or the bell whistle until she was so close to the gate as to be unable to stop her car at the speed she was travelling. Under the circumstances, we feel that there was ample evidence to justify the verdict of the jury both on the question of the negligence of the plaintiff and of contributory negligence on the part of the defendant. We hold that under the evidence the Trial Court properly denied defendant's motion for directed verdict and for judgment notwithstanding the verdict, and that under the action for new trial, the verdict was not contrary to the manifest weight of

the evidence but was in accord with the greater weight of the evidence under the issues of fact herein.

Defendant alleged prejudicial error in admission of evidence and refusal of an instruction in relation thereto. On plaintiff's behalf, the bridge tender who succeeded him testified to finding the sheared bolt in which the gate latch was fitted lying some distance from the place of its severance on the following morning. Upon defendant's objection that conditions were not shown to be the same at the time this sheared bolt was found as at the time of the collision, the jury were instructed to disregard this testimony. Also, among the twenty four instructions given on behalf of the defendant, one specifically instructed the jury to disregard any testimony that had been stricken by the Court.

A further refused instruction singled out this particular bit of testimony and instructed the jury to disregard it, which instruction was properly refused. While it is not necessary to pass upon the admissibility of the particular testimony, it is clear that the direction to the jury to disregard it and the instruction to disregard all testimony which was stricken amply protected the rights of the defendant, and from a fair reading of the testimony and instructions in question, it does not appear that prejudice to the defendant could have resulted therefrom. We hold that there is no merit in defendant's contention that the refusal to give this instruction was prejudicial.

Certain argument, which we need not detail here, was made by counsel for plaintiff to which objection was made and sustained by the Court, and in other instances objection is raised to the Court's remark upon objection that "the jury heard the evidence and will be governed by the instructions of the Court." The case was closely contested and vigorously argued by respective counsel, but we find no prejudicial statements which in our judgment could have affected the verdict of the jury.

the evidence but was in accord with the greater weight of the evidence under the facts of this case.

Defendant alleged prejudicial error in admission of evidence

and removal of an instruction in relation thereto. On plaintiff's behalf, the bridge tender who unhooked him testified to finding the sheared bolt in which the gate latch was fitted lying some distance from the place of its severance on the following morning. Upon

defendant's objection that conditions were not shown to be the same at the time this sheared bolt was found as at the time of the collision, the jury were instructed to disregard this testimony. Also, among the twenty-four instructions given on behalf of the defendant, one essentially instructed the jury to disregard any testimony that had been stricken by the court.

A further refusal instruction singled out this particular bit of testimony and instructed the jury to disregard it, which instruction was properly refused. While it is not necessary to give upon the admissibility of the particular testimony, it is clear that the direction to the jury to disregard it and the instruction to disregard all testimony which was stricken entirely protected the rights of the defendant, and from a fair reading of the testimony and instructions in question, it does not appear that prejudice to the defendant could have resulted therefrom. We hold that there is no merit in defendant's contention that the refusal to give this instruction was prejudicial.

Certain argument, which we need not detail here, was made by counsel for plaintiff to which objection was made and sustained by the Court, and in other instances objection was made to the Court's remarks upon objection that "the jury heard the evidence and will be governed by the instructions of the Court." The case was closely contested and vigorously argued by respective counsel, but we find no prejudicial statements which in our judgment could have affected the verdict of the jury.



Respective parties have cited and have quoted from numerous decisions on the question of excessive damages for injuries of the nature which the plaintiff has suffered herein under varying circumstances. In some instances, damages equal in amount to those fixed by the jury were upheld under circumstances quite similar to those of the case at bar. In some instances under varying circumstances, remittiturs were required by the Court of Review as an alternative to granting a new trial, and in some cited cases, the amounts of such verdicts were found to be excessive and new trial was granted. In the instant case, the plaintiff, aged seventy one years, was shown to have an approximate ten year life expectancy by the only evidence in the record. His loss of wages for the time prior to the injury approximated \$1500 or \$1600; his physician's and hospital bills in excess of \$800. The proof justifies the conclusion that he has been and will be unable to work at his previous employment or in any other gainful employment; that prior to his injury, while in advanced years, he had enjoyed good health and suffered no injuries and was capable of satisfactorily performing the work in which he was engaged. From his injuries he sustained great physical pain, suffering and disability, which still remain and are of a permanent nature. The amount of the verdict in a given case is peculiarly a matter within the province of the jury when responsive to the testimony, and unless the finding of the jury is grossly excessive or reflects passion, prejudice or ulterior influences prejudicial to the defendant, a Court of Review should not disturb the finding of a jury and the judgment of the Trial Court based thereon. In this case, while the damages are very substantial, they were responsive to the evidence, and we cannot hold, as a matter of law, that any prejudice to the defendant is shown or reflected therein.

Finding no reversible error in the record, the judgment of the Circuit Court of Tazewell County will be affirmed.

JUDGMENT AFFIRMED.

The active parties have filed and have passed the same. The  
 testimony on the question of excessive damages for injuries of the nature  
 which the plaintiff has suffered herein varies of course. In  
 some instances, damages equal in amount to that fixed by the jury were  
 found under circumstances quite similar to those of the case at hand.  
 In some instances under varying circumstances, verdicts were rendered  
 by the court of view as an alternative to granting a new trial, and  
 in some cases, the amount of such verdicts were found to be  
 excessive and the trial was granted. In the instant case, the plaintiff,  
 aged seventy-one years, was shown to have an enjoyment of a good life  
 expectancy by the only witness in the record. His loss of wages for the  
 time prior to the injury was limited \$1500 or \$1600; his physician's and  
 hospital bills in excess of \$600. The proof justified the conclusion  
 that he had been and will be unable to work at his previous occupation  
 or in any other kind of employment; that prior to his injury, while in  
 whatever year, he had enjoyed good health and suffered no injury and  
 was capable of satisfactorily performing the work in which he was  
 engaged. From the injuries he sustained great physical pain, suffering  
 and disability, which still remain one of a permanent nature. The  
 amount of the verdict in a given case is possibly a matter within  
 the province of the jury when responsive to the testimony, and unless  
 the finding of the jury is grossly excessive or reflects upon  
 prejudice or ulterior influences, judicial to the defendant, a court  
 of review should not disturb the finding of a jury and the judgment of  
 the trial court based thereon. In this case, while the damages are  
 very substantial, they were responsive to the evidence, and we cannot  
 hold, as a matter of law, that any objection to the defendant is shown  
 or needed therein.  
 Finding no reversible error in the record, the judgment of  
 the Circuit Court of Casswell County will be affirmed.  
 JUDGEMENT AFFIRMED.

Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

72  
FEBRUARY  
October Term, A. D., 1941<sup>2</sup>

General No. 9315.

Agenda No. 17.

GARRIE M. CRAIG,  
HAZEL I. CRAIG,

Plaintiff Appellants,

-vs-

LEWIS G. COONROD, Receiver of  
the First National Bank of  
Urbana, Illinois, and DON D.  
RICHMOND,

Defendant Appellees.

652  
Appeal from  
Circuit Court,  
Champaign County.

314 I.A. 379<sup>1</sup>

RIESS, J.:

Appeal herein was taken from a judgment in bar of suit and for costs entered in the Circuit Court of Champaign County in favor of defendant appellees, Lewis G. Coonrod, Receiver of the First National Bank of Urbana, Illinois, and Don D. Richmond and against plaintiffs Carrie M. Craig and Hazel I. Craig. Appellant Hazel I. Craig appeared pro se, and Carrie M. Craig, who joined with her in the notice of appeal and praecipe, failed to file or join in the abstract of record, assignments of error or briefs and argument of appellant, but her name is appended to appellants' reply brief.

The pleadings in the lower Court consisted of a second amended complaint and defendants' motion to dismiss same, which was granted. An attempt to appeal to this Court was made by plaintiffs after defendants' motion in the nature of a demurrer had been so sustained, but before a judgment or final appealable order was entered. The applicable rule is stated in Daab v. Ritter, 294 Ill. App. 203,



10-11-37

STATE OF ILLINOIS  
JUDICIAL DEPARTMENT  
CLERK OF THE COURT

FILED IN CASE NO. 1000

APRIL 17, 1937

General No. 1000

CHARLES E. GRAIG,  
Plaintiff,

vs.

-vs-

JOHN A. JOHNSON, Receiver of  
the First National Bank of  
Chicago, Illinois, and J. A.  
JOHNSON, Defendant.

Defendant's Answer.

Answer from  
Charles E. Graig,  
Plaintiff.

1000-1000

Appeal herein was taken from a judgment in part of said and  
the court entered in the Circuit Court of Cook County in favor  
of defendant receiver, John A. Johnson, Receiver of the First  
National Bank of Chicago, Illinois, and J. A. Johnson and against  
Charles E. Graig and J. A. Graig. Plaintiff Charles E.  
Graig appeared pro se, and Charles E. Graig, who joined with her in  
the notice of appeal and motion, filed to file on join in the  
statement of record, assignments of error or briefs and argument of  
appeal, and was also represented by appellant's legal counsel.  
The findings in the lower court consisted of a verdict  
awarded compensation and damages, motion to dismiss same, which was  
granted. An attempt to remove to this court was made by plaintiff's  
after defendant's motion in the nature of a demurrer had been so  
sustained, and before a judgment or final appellate order was entered.  
The applicable rule is stated in Bush v. Ritter, 212 Ill. App. 205,

13 N. E. (2d) 636. This attempted appeal was dismissed by this Court upon defendants' motion in Gen. No. 9275 on February 20, 1941. Judgment in favor of defendant in bar of suit was then entered upon the pleadings in the lower court, followed by this appeal.

The second amended complaint consisted of eight counts wherein plaintiffs undertook to set up causes of action alleging damages to have been sustained by Carrie M. Craig as life tenant and owner of grain crops mentioned in the pleadings and by Hazel I. Craig as "remainderman", growing out of an alleged unlawful seizure and sale of crops under a garnishment writ previously procured in a Justice of the Peace Court by defendant Receiver and co-defendant Richmond, as his attorney, which action was alleged to have occurred in 1934, almost six years before the suit was filed.

It is difficult from the pleadings to ascertain the exact nature of the purported charges in the complaint. Reference is made to libel, slander and alleged unlawful action of defendants in the garnishment proceedings, which had terminated in favor of said Receiver as a judgment creditor and not of the plaintiff. A number of confused statements in the nature of conclusions are set forth in the pleadings and in the abstract, briefs and argument of appellant Hazel I. Craig, but from a careful examination thereof in the light most favorable to the plaintiff, it is evident that the lower court properly held that the amended complaint wholly failed to set forth necessary elements of a cause or causes of action upon which issues might be joined and litigated upon the merits by the defendants. While the Trial Court was liberal and considerate in its rulings in relation to the pleadings on account of the fact that the plaintiff appeared pro se, neither that Court nor this Court upon review of the record would be justified in holding that a cause of action was stated in the complaint. A complaint must contain sufficient averments to state a cause of action. No

In W. E. (201) 224. This material was obtained by John Jones  
on defendant's motion in Dec. 1936 on February 20, 1937. Judgment  
in favor of defendant in that case was then entered upon the findings  
in the lower court, followed by this appeal.

The second amended complaint consisted of eight counts wherein  
plaintiffs sought to set as aside of action alleged wrongs to have  
been committed by Garrie M. Davis on his second and third of gains  
proper mentioned in the complaint and by Daniel L. Davis as "intervenor",  
growing out of an alleged unlawful seizure and sale of goods with a  
government with previously provided in a fraction of the same Court  
by defendant receiver and co-defendant defendant, as the attorney, which  
action was alleged to have occurred in 1934, almost six years before  
the suit was filed.

It is difficult from the complaint to ascertain the exact  
nature of the purported charges in the complaint. Reference is made  
to first, second and alleged unlawful action of defendant in the  
government proceeding, which had terminated in favor of said receiver  
as a judgment receiver and not of the plaintiff. A request of defendant  
in the matter of amendment are set forth in the complaint  
and in the second, which and request of appellant Daniel L. Davis,  
not from a careful examination thereof in the light of the facts in  
the complaint, it is evident that the lower court properly held that  
the second complaint wholly failed to set forth necessary elements of

a cause or cause of action that with proper might be joined and  
litigated upon the merits by the defendant. While the third count  
was liberal and comprehensive in its findings in relation to the findings  
on account of the fact that the plaintiff appeared and so, neither that  
Court nor this Court upon review of the record would be justified in  
holding that a cause of action was stated in the complaint. A complaint  
which contains sufficient elements to state a cause of action. No



facts tending to show fraud, malice or want of proper care are set forth in either the original or amended complaint or any count thereof.

The alleged errors assigned by Hazel I. Craig were that "the Court erred in rendering a verdict contrary to the evidence; the court erred in rendering a verdict contrary to the law" and that "the Court erred in entering a judgment for the defendants and against the plaintiffs" and asked that judgment be entered in this Court for the amount of the damages claimed in the complaint or that the judgment be reversed and cause remanded, and also asked for an order of this Court, if deemed "proper", that the Comptroller, presumably the United States Comptroller of Currency, be made a party to this suit. No trial nor verdict was had herein; the ruling of the lower court being solely upon the pleadings. The Comptroller was not made a defendant in the lower Court nor was any attempt by amendment of the complaint or prayer for process against the Comptroller sought in that Court. This Court, of course, would be powerless to enter any such order upon review herein. No further alleged errors were assigned.

No motion to dismiss the alleged appeal of Hazel I. Craig was made, and as the record now stands before us with no reversible error appearing therein, this Court can only affirm the judgment of the Trial Court.

Judgment in bar of suit against both plaintiff appellants and in favor of both defendant appellees as entered by the Circuit Court of Champaign County is therefore affirmed.

JUDGMENT AFFIRMED.

facts tending to show fraud, unless on part of counsel was the  
fact in either the original or amended complaint or any count therein.  
The alleged errors assigned by counsel I. Grant were that  
"the Court erred in rendering a verdict contrary to the evidence;  
the Court erred in rendering a verdict contrary to the law and that  
"the Court erred in entering a judgment for the defendant and against  
the plaintiff" and asked that judgment be entered in this Court for  
the benefit of the defendant against the plaintiff in that the judgment  
be reversed and cause remanded, and also asked for an award of this  
Court, its assessed "prob", that the Comptroller, presumably the United  
States Comptroller of Currency, be made a party to this suit. In  
this new verdict was not herein; the ruling of the lower court being  
solely upon the allegations. The Comptroller was not made a defendant  
in the lower Court nor was any attempt by amendment of the complaint  
or prayer for process against the Comptroller sought in that Court.  
This Court, of course, would be powerless to enter any such order  
upon review herein. No further alleged errors were assigned.  
No motion to allow the alleged error of counsel I. Grant  
was made, and as the record now stands before us with no reversible  
error appearing therein, this Court can only affirm the judgment of  
the Trial Court.  
Judgment in favor of said plaintiff both jointly and severally  
and in favor of both defendant appellees as ordered by the Circuit  
Court of Cassia County is therefore affirmed.

RECORDED & INDEXED.

41918

JULIA GIBBONS,

Appellee,

v.

CITY OF CHICAGO, a Municipal corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

314 I.A. 3790

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Circuit Court of Cook County, Julia Gibbons sought to recover damages from the City of Chicago for personal injuries sustained by her as a result of a defect in a street. A trial before the court and a jury resulted in a verdict for plaintiff in the sum of \$4,000. Motions for a directed verdict and for a new trial were overruled and judgment was entered, to reverse which this appeal is prosecuted.

On July 25, 1938, at about 5:30 P. M., plaintiff, 77 years old, was walking in an easterly direction upon the south sidewalk of East 75th Street at and near its intersection with Exchange Avenue. 75th Street runs in an easterly and westerly direction, and Exchange Avenue runs in a northwesterly and southeasterly direction. The Illinois Central Railroad operates two sets of tracks, or four rails, in a northwesterly and southeasterly direction in the center of Exchange Avenue. This right of way divides the northbound and southbound vehicular traffic. The roadway to the west of the right of way, used by the southbound traffic, is 16 feet wide and paved with concrete. The roadway to the east of the right of way is used by the northbound traffic. There was a hole in the center of the west roadway at a point which would be in the center of the south sidewalk of 75th Street were it extended across the roadway. This hole was about 8 feet east of the west curb of the west roadway, and it was about 8 inches long, 6 inches wide and 6 inches deep. As plaintiff reached the west curb of the west roadway no vehicular traffic was going south. She walked in an easterly direction from the sidewalk onto the roadway. Several other pedestrians were crossing the west



WILLIAM ALBION

Defendant

v.

CITY OF CHICAGO, a Municipal Corporation

Plaintiff

3141 A. 319

BEFORE THE JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA

In a complaint filed in the District Court of Cook County,

Julius Albion sought to recover damages from the City of Chicago

for personal injuries sustained by her as a result of a defect in

the street, a trial before the court and a jury resulted in a verdict

for plaintiff in the sum of \$4,000. Motion for a directed verdict

and for a new trial were overruled and judgment was entered, to

reverse which this appeal is prosecuted.

On July 10, 1928, at about 8:30 P. M., plaintiff, 77 years

old, was walking in an easterly direction upon the south sidewalk of

East 75th Street at and near its intersection with Monroe Avenue.

West Street runs in an easterly and westerly direction, and Monroe

Avenue runs in a northerly and southerly direction. The

Illinois Central Railroad operates two sets of tracks, or four rails,

in a northerly and southerly direction in the center of

Monroe Avenue. The right of way divides the northbound and south-

bound vehicular traffic. The roadway to the west of the right of way,

used by the southbound traffic, is its full width and paved with

concrete. The roadway to the east of the right of way is used by

the northbound traffic. There was a hole in the center of the west

roadway at a point which would be in the center of the south sidewalk

of 75th Street were it extended across the roadway. This hole was

about 2 feet east of the west curb of the west roadway, and it was

about 2 inches long, 2 inches wide and 2 inches deep. As plaintiff

reached the west curb of the west roadway no vehicular traffic was

going south. She walked in an easterly direction from the sidewalk

onto the roadway. Several other pedestrians were crossing the west

roadway at the same time. There is evidence that when plaintiff was about half way across the west roadway, an automobile traveling in a southeasterly direction approached from her left; that the motorist blew his horn, applied his brakes hurriedly, and came to a stop about 5 feet from plaintiff; that she noticed the car approaching and stepped back; and that in stepping back her heel went into the hole in the center of the street and she fell to the pavement. Two or three men picked her up and carried her to the office of a physician. She was then taken in an ambulance to a hospital, where X-ray pictures showed a fracture of the head of the femur. She remained in the hospital until May, 1939. Prior to the occurrence she was in good physical condition and had had no previous medical attention. At the time of the trial she was 80 years old. There was evidence tending to show an inch and a half shortening in the injured leg, that her heart was irregular, and that her pulse was quite rapid. She limped and was able to walk only with the aid of a cane.

The first point urged by defendant is that the burden was upon the plaintiff to prove that at and about the time and place of the accident she was in the exercise of due care for her own safety. Plaintiff recognizes that this is the law. She insists that the evidence shows that at the time and place of the accident she was in the exercise of due care for her own safety. The second point presented by defendant is that the evidence establishes as a matter of law that plaintiff did not exercise due care. The third and final point advanced by defendant is that the trial court should have directed a verdict for the defendant because of plaintiff's contributory negligence. Plaintiff answers these assertions by declaring that contributory negligence becomes a question of law only when the court can say that all reasonable minds must agree that the injury was the result of plaintiff's own negligence. Plaintiff asserts that the trial court properly refused to direct

... of the case. There is evidence that when Plaintiff  
was about half way across the street, an automobile traveling  
in a southeasterly direction approached from her left; that she  
retorted blew his horn, pulling his brakes suddenly, and came to a  
stop about 2 feet from Plaintiff; that she noticed the car as approaching  
and stopped back; and that in stopping back her feet went into the  
hole in the center of the street and she fell to the pavement. Two  
or three men joined her and carried her to the office of a  
physician. She was then taken to an apartment as a hospital, where  
X-ray pictures showed a fracture of the head of the femur. She  
remained in the hospital until May, 1930. Prior to the accident  
she was in good physical condition and had had no previous medical  
attention. At the time of the trial she was 30 years old. There  
was evidence tending to show an inch and a half laceration in the  
injured leg, that her hand was irregular, and that her palm was  
double pitted. The laceration was held to have been made by the  
fall. The first point urged by defendant is that the burden was  
upon the Plaintiff to prove that at and about the time and place of  
the accident she was in the exercise of due care for her own safety.  
Plaintiff recognizes that this is the law. She insists that the  
evidence shows that at the time and place of the accident she was  
in the exercise of due care for her own safety. The second point  
presented by defendant is that the evidence establishes as a matter  
of law that Plaintiff did not exercise due care. The third and  
final point advanced by defendant is that the trial court should  
have directed a verdict for the defendant because of Plaintiff's  
contributory negligence. Plaintiff insists that these assertions by  
defendant that contributory negligence becomes a question of law  
only when the court can say that all reasonable minds must agree  
that the injury was the result of Plaintiff's own negligence.  
Plaintiff insists that the trial court properly refused to direct



a verdict for the defendant as there was evidence of due care. From these statements of the respective contentions of the parties, it will be observed that the defendant concedes that there was competent evidence tending to establish that it was guilty of negligence. The only question presented for our consideration is whether the court erred in refusing to direct a verdict for the defendant. Defendant maintains that because of a complete absence of any evidence of the exercise of due care by the plaintiff, it was the duty of the trial court, as a proposition of law, to direct a verdict for the defendant.

We are of the opinion that a reading of the statement of facts shows clearly that plaintiff was in the exercise of due care for her own safety. She was walking in an easterly direction in common with other pedestrians proceeding in the same direction. She observed the automobile coming from the north and to avoid being struck by it, she stepped back. This action by a woman of her years clearly shows that she was cautious. The fact that plaintiff did not testify does not constitute any good reason for refusing judgment in her favor. The trial court was right in refusing to direct a verdict and in entering judgment. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

a verdict for the defendant as there was evidence of the same. These statements of the respective positions of the parties, it will be observed that the defendant contends that there was sufficient evidence tending to establish that it was guilty of negligence. The only question presented for our consideration is whether the court erred in refusing to direct a verdict for the defendant. Defendant maintains that because of a complete absence of any evidence of the exercise of due care by the plaintiff, it was the duty of the trial court, as a proposition of law, to direct a verdict for the defendant.

We are of the opinion that a reading of the statement of facts shows clearly that plaintiff was in the exercise of due care for her own safety. She was walking in an entirely straight line common with other pedestrians proceeding in the same direction. She observed the automobile coming from the north and to avoid being struck by it, she stepped back. This action by a woman of her years clearly shows that she was negligent. The fact that plaintiff did not testify does not constitute any good reason for refusing judgment in her favor. The trial court was right in refusing to direct a verdict and in entering judgment. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

THOMAS J. BROWN.

WILLIAM A. BELL, JR. COUNSEL.

41931

LOUIS BOJARSKI,

Appellant,

v.

EVERETT G. BALLARD,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

314 I.A. 380'

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On May 14, 1941, Louis Bojarski, filed his three count complaint in the Superior Court of Cook County for the recovery of the cost of \$8,000 worth of improvements, which Everett G. Ballard allegedly converted to his own use, and for damages based on malicious prosecution and abuse of process. A motion to dismiss filed by defendant, was sustained, and this appeal followed. The complaint, as summarized in plaintiff's brief, reads:

"Count 1. On February 10th, 1932, the defendant filed suit to recover \$5,000 for the first year's and \$1,500 for the second year's rental, on a lease from defendant as lessor and plaintiff as lessee commencing May 18, 1931. He also offered to cancel all claims for rent under the lease including rent represented by a \$500 note, in exchange for plaintiff's \$8,000 worth of improvements. Defendant assured plaintiff that he and his attorneys would take no further steps in the cause for rent then pending in LaPorte Superior Court as No. 9332. Plaintiff accepted defendant's offer. On the strength of this agreement defendant took and kept the improvements. On January 28, 1933, in violation of his agreement and without giving any notice to the plaintiff herein, or his counsel, Ballard secured a judgment by default, in cause No. 9332, of LaPorte Superior Court, for \$2,295.00, that is, \$500 for the first year's, \$1,500 for the second year's rent, and \$295 for attorney's fees. Ballard made no attempt to collect this secretly secured judgment until December 27, 1940, when through supplementary proceedings in Lake Superior Court sitting in Gary, Ind., cause No. 52929, he attached more than \$1,700 of the plaintiff's money in Calumet Title Company, Inc., and Calumet Securities Corp. On January 14, 1941 the plaintiff filed in LaPorte Superior Court, cause No. 13311, a complaint to set aside Ballard's judgment for rent and attorney's fees. On January 16, 1941, the Lake Superior Court of Gary, Ind. stayed Ballard's attachment proceedings pending disposal of cause No. 13311 in LaPorte Superior Court at Michigan City, Ind. The lease provides, 'If said Ballard sells the above land before the expiration of the lease he agrees to pay for the cost of construction of said cottages and parking station.' Its expiration date was December 21, 1935. Ballard sold the land on June 20, 1935, more than six months before the expiration of the lease but has failed and refused either to satisfy his wrongfully obtained judgment in cause No. 9332 or to pay 'the cost of construction of said cottages and parking station.' Plaintiff prays judgment for \$8,000, or in the alternative, a rule on Everett G. Ballard to satisfy the wrongfully and fraudulently obtained judgment.



PLAINT FOR DAMAGES

Defendant,

v.

WILLIAM O. BELLARD,

Plaintiff.

3141A.380

MR. JUSTICE JAMES H. HARRIS, THE CHIEF OF THE COURT.

In May 11, 1941, James H. Harris, filed his first count

complaint in the Superior Court of Cook County for the recovery of

the cost of \$2,000 worth of improvements, which overestimates the

amount actually expended to his own use, and for damages based on malicious

opposition and abuse of process. A motion to dismiss filed by

defendant, was sustained, and this second followed. The complaint

is summarized in plaintiff's brief, which:

Paragraph 1. On February 10, 1935, the defendant filed  
 suit to recover \$2,000 for the first year's rent and \$1,000 for the  
 second year's rent, on a lease from defendant to plaintiff and plain-  
 tiff as tenants commencing May 18, 1934. The lease provided for a total  
 of \$2,000 per year for rent under the lease. The lease was terminated by  
 a 1935 note, in accordance with plaintiff's \$2,000 worth of improve-  
 ments. Defendant agreed to plaintiff's lease and his improvements would  
 take no further lease in the case for rent under the lease in 1935.  
 Superior Court No. 332. Plaintiff accepted defendant's offer.  
 On the terms of this agreement plaintiff took and kept the  
 improvements. On January 22, 1937, in violation of his agreement  
 and without giving any notice to the plaintiff's heirs, he  
 caused plaintiff to secure a judgment by default in case No. 332,  
 in Superior Court, for \$2,000.00, that is, \$2,000 for the  
 first year's rent, \$2,000 for the second year's rent, and \$2,000 for  
 attorney's fees. Plaintiff made no attempt to collect said second  
 year's judgment until December 27, 1940, when plaintiff voluntarily  
 proceeded to take Superior Court action in case No. 332, and  
 No. 332, he attached more than \$1,700 of the plaintiff's money  
 in various little amounts, less, and almost certainly more, on  
 January 14, 1941 the plaintiff filed in Superior Court, No. 332,  
 a complaint to set aside plaintiff's judgment for  
 rent and attorney's fees. On January 18, 1941, the case was  
 set for trial. Plaintiff's complaint was a statement proceeding pending  
 Court of case No. 332 in the Superior Court of Cook County  
 against of case No. 332 in the Superior Court of Cook County  
 City, Ill. The case provided, 'It is alleged that the above  
 facts before the execution of the lease he was to pay for the  
 cost of construction of said cottages and parking station.' The  
 on January 14, 1941, plaintiff took the case on  
 June 20, 1935, when six months before the expiration of the  
 lease but was failed and refused either to satisfy his voluntarily  
 obtained judgment in case No. 332 or to pay 'the cost of construc-  
 tion of said cottages and parking station.' Plaintiff says  
 judgment for \$2,000, or in the alternative, a rule on plaintiff.  
 failed to satisfy the voluntarily and lawfully obtained judgment.

"Count 2. Plaintiff realleges all material facts contained in Count 1. On February 7, 1941, defendant maliciously and with intent to harm, ruin and compel the plaintiff herein to pay him large sums of money to which said Ballard was not entitled, did file in Lake Superior Court sitting in Hammond, Ind., not one but four supplementary suits against the plaintiff herein and persons holding funds belonging to him, attaching large sums of money belonging to the plaintiff herein seriously hampering his business and affecting his standing with his customers and the community. The plaintiff herein has been compelled to spend large sums of money in defending such suits; that said acts and doings of Everett G. Ballard amount to malicious prosecution.

"Count 3. Plaintiff realleges each and every factual allegation contained in Counts 1 and 2, and for a further cause of action states that the number of supplemental suits filed by Everett G. Ballard also constitutes malicious abuse of process."

Plaintiff's theory is that he has a right to recover the cost of the improvements "because [Count 1] the defendant converted them to his own use when he secured a judgment for \$2,295 after misleading the plaintiff herein into believing that the improvements were accepted in full payment of all claims under the lease; or because Ballard promised to pay for said improvements if he sold the land before December 31, 1936, and he sold it six months before that date; [Count 2] defendant must respond in damages for malicious prosecution for attaching more than \$1,700 of the plaintiff's funds through cause No. 52296 at Gary, Indiana, but especially because three weeks after the Lake Superior Court of Gary, Ind. stayed defendant's attachment proceedings pending disposition of the suit to set aside the judgment for rent, Ballard saw fit to file four more attachment suits in Lake Superior Court at Hammond, Indiana; [Count 3] defendant must respond to plaintiff in damages because the number of attachment suits filed by him constitutes abuse of process." Defendant's theory, as stated by plaintiff, is that "the complaint is a collateral attack on a judgment of a sister State. There is another action pending between the parties hereto for the same cause. Plaintiff's action is barred by the Statute of Limitations. Plaintiff was negligent throughout the transactions stated in the complaint."

The first point advanced by plaintiff is that any unauthorized act by which an owner is deprived of his property permanently



Count 2. Plaintiff alleges that defendant's conduct in Count 1, on February 2, 1937, defendant maliciously and with intent to harm, took and caused the plaintiff to pay his large sum of money in which said plaintiff was not entitled, but his life in the manner of a loan in defendant's name and but four months later with intent to defraud plaintiff and defendant holding funds belonging to him, defendant failed to pay money belonging to the plaintiff having already received his business and effected his clearing with his wife and the community. The plaintiff herein has been compelled to spend large sums of money in defending each side; that said side and claim of over \$1,000. Plaintiff moved to call for production, and claim of over \$1,000. Plaintiff claims such and every fact as alleged in Count 1 and 2, and for a further cause of action to the effect that the number of witnesses who filed by Count 1. Plaintiff also alleges malicious abuse of process."

Plaintiff's theory is that he has a right to recover the cost of the improvements "because (Count 1) the defendant converted them to his own use when he secured a judgment for \$1,000 after mislending the plaintiff herein into believing that the improvements were accepted in full payment of all claims under the lease; or because defendant refused to pay for said improvements if he sold the land before December 31, 1937, and he sold it all months before that date; (Count 2) defendant went beyond in damage for malicious prosecution for attempting to get \$1,000 of the plaintiff's funds through Count 1, Count 2, and especially because three months after the Lake Superior Court of May, Ind. stated defendant's attempted proceedings pending disposition of the suit to set aside the judgment for want, plaintiff was left to file four more attachment suits in Lake Superior Court at Lansing, Indiana; (Count 3) defendant went on and to plaintiff in damages because the number of attachment suits filed by him constitutes abuse of process." Defendant's theory, as stated by plaintiff, is that "the complaint is a collateral attack on a judgment of a sister State. There is another action pending between the parties hereto for the same cause. Plaintiff's action is barred by the statute of limitations. Plaintiff has no right throughout the transactions stated in the complaint."

The first point advanced by plaintiff is that any unauthorized kind act by which an owner is deprived of his property constitutes



or indefinitely, or the exercise or dominion over property, inconsistent with the rights of the owners, is a conversion. He also argues that a party has a cause of action against another who maliciously and without probable cause institutes a succession of suits against him, and that an abuse of process exists where a party employs such process for some unlawful purpose which it was not intended by the law to effect. He states that the term "abuse of process" means the perversion or accomplishment of some illegal object for which such process was not legally intended. He insists that defendant's motion to strike is without merit and that "a complaint which on its face states a good cause of action cannot be finally disposed of on motion to dismiss, as any formal defect may be cured by amendment." Defendant meets these arguments by asserting that the judgment in cause No. 9332 in the Superior Court of LaPorte County, Indiana, rendered January 26, 1933, in favor of defendant in the instant case, precludes the maintenance of the present action; that such judgment is res judicata of all questions properly involved in the suit in which it was rendered, including the question whether the parties had by contract compromised the subject matter of that suit; and that judgment of a sister State cannot be collaterally attacked by a proceeding in a court of this State, even upon a charge of fraud in obtaining it. We agree that the judgment in cause No. 9332 in the Superior Court of LaPorte County, Indiana, which has not been modified or vacated, is res judicata as to the cause of action asserted, and that such judgment cannot be collaterally attacked. We also agree that the complaint in the instant case does not afford any basis for attacking such judgment.

Defendant maintains that the complaint does not state a cause of action for malicious prosecution or abuse of process; that there is no showing of malice or want of probable cause; that the only concluded litigation between the parties was resolved in favor of defendant and that the process described in the complaint

or indirectly, or the violation of a condition of property, interest  
in the right of the owner, is a conversion. It is also  
argued that a party has a cause of action against another who  
voluntarily and without compulsion has transferred a possession of  
goods to him, and that he should be treated as if he were  
party to the transaction. Such persons are not liable for conversion which is not  
not intended by the law to be treated. The statute that the term "conversion  
of goods" means the conversion or appropriation of some personal  
object for which such person was not legally intended. He is liable  
that defendant's action is liable in respect to goods and that  
conversion which on its face seems a good cause of action cannot be  
finally disposed of on motion to dismiss, as any federal court may  
be cured by amendment." Defendant moved those arguments by asserting  
that the judgment in case No. 1032 in the Superior Court of  
Lafayette County, Indiana, rendered January 26, 1925, in favor of  
defendant in the instant case, precluded the maintenance of the  
present action; that such judgment is the judgment of all questions  
properly involved in the suit in which it was rendered, including  
the question whether the parties had by contract compromised the  
subject matter of this suit; and that judgment of a higher state  
court or collectively attacked by a proceeding in a court of this  
state, even upon a charge of fraud in obtaining it. It is argued that  
the judgment in case No. 1032 in the Superior Court of Lafayette  
County, Indiana, which has not been modified or vacated, is the  
judgment as to the cause of action asserted, and that such judgment  
cannot be collectively attacked. It is also argued that the judgment  
in the instant case does not afford any basis for attacking such  
judgment.

Defendant maintains that the complaint does not state a  
cause of action for malicious prosecution or abuse of process; that  
there is no showing of malice or want of probable cause; that the  
only pleaded allegation between the parties was resolved in  
favor of defendant and that the process described in the complaint

is for the purpose of enforcing defendant's previously obtained judgment. The complaint shows that the litigation has not terminated in favor of the plaintiff, or that the defendant is acting without probable cause in endeavoring to collect his judgment. We assume that the action of the Superior Court of La Porte County in entering the judgment on January 26, 1933, was proper. The attachment suits thereafter commenced were for the purpose of collecting such judgment. Clearly, no cause of action can be maintained against the defendant because he did that which he had a right to do. We also assume that the courts of Indiana will decide the causes according to the law and the evidence, and that if plaintiff herein is right in his contentions, he will prevail. We agree with defendant that plaintiff was not prevented from amending his complaint. He made no motion to amend, nor did he present any proposed amendment so that the trial court could determine what such amendment would be.

Defendant argues other points. As we have arrived at the conclusion that the court was right in dismissing the complaint, it is unnecessary to extend this opinion by discussing such points, some of which are being litigated in the Indiana courts. Because of the views expressed, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.



is for the purpose of entering defendant's complaint against  
judgment. The complaint shows that the plaintiff has not  
in favor of the plaintiff, and that the defendant is acting without  
probably cause in endeavoring to collect the judgment. It seems  
that the action of the Justice Court of Cook County in entering  
the judgment on January 22, 1925, was proper. The defendant writes  
that the defendant's complaint was for the purpose of collecting such judgment.  
Obviously, no action of course can be maintained against the defendant  
because he did that which he had a right to do. He also states that  
the action of Justice will decide the issues according to the law  
and the evidence, and that if plaintiff's claim is not  
sustained, he will prevail. He states with defendant that plaintiff  
will not be prevented from amending his complaint. He makes no  
motion to amend, nor did he present any proposed amendment so that  
the trial court would determine that such amendment would be.  
Defendant argues cross points. As we have arrived at  
the conclusion that the court was right in dismissing the complaint,  
it is unnecessary to extend this opinion by discussing each point,  
some of which are being litigated in the instant cause. Reasons  
of the above expressed. The judgment of the Justice Court of  
Cook County is affirmed.

JUDGMENT AFFIRMED.

WHEEL AND SINK, J. J. WOODCOCK.

41848

HENRY ROKICKI, a minor, by JOSEPH ROKICKI,  
his father and next friend,

Plaintiff - Appellant,

v.

POLISH NATIONAL ALLIANCE OF THE UNITED  
STATES OF NORTH AMERICA, a corporation,

Defendant - Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

314 I.A. 380<sup>2</sup>

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is a suit instituted on behalf of Henry Rokicki, a minor, by Joseph Rokicki, his father and next friend against the defendant corporation, which was the owner of premises upon which the plaintiff was injured. The defendant denied the allegations of negligence and attractive nuisance alleged in plaintiff's complaint. A trial was had before a Judge and a jury in the Circuit Court of Cook County, and the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages in the sum of \$3,500. Thereafter, the trial court sustained defendant's motion for a directed verdict at the close of all the evidence and entered judgment for defendant notwithstanding the verdict of the jury, from which action this appeal is taken.

The facts of this case, as called to the attention of this court by plaintiff's statement, are that the defendant, Polish National Alliance of the United States of North America, owned and operated a building at 3519 Belmont Avenue, Chicago; that it was a two-story frame house with a back yard, in which was a shed and garage; that adjacent to the premises at 3519 Belmont and west of it, there was a playhouse on an otherwise empty lot; that children used to play on the playhouse lot, some playing baseball; and children of tender years, playing such games as "It", "I got it", "Tag", and "Cops and Robbers"; that the house at 3519 Belmont Avenue was in an apparently dilapidated condition; that the foundation settled on the east side of the house;

HENRY JOSEPH, a minor, by Joseph JOSEPH, his father and next friend,

Plaintiff - Defendant,

v.

POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA, a corporation,

Defendant - Plaintiff.

31 + 1.A. 380

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT:

This is a suit instituted on behalf of Henry Joseph, a minor, by Joseph JOSEPH, his father and next friend against the defendant corporation, which was the owner of premises upon which the plaintiff was injured. The defendant denied the allegations of negligence and attractive nuisance alleged in plaintiff's complaint. A trial was had before a judge and a jury in the District Court of Cook County, and the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages in the sum of \$2,500. Thereafter, the trial court sustained defendant's motion for a directed verdict at the close of all the evidence and entered judgment for defendant notwithstanding the verdict of the jury, from which action this appeal is taken.

The facts of this case, as called to the attention of this court by plaintiff's statement, are that the defendant, Polish National Alliance of the United States of North America, owned and operated a building at 2519 Belmont Avenue, Chicago; that it was a two-story frame house with a back yard, in which was a shed and garage; that adjacent to the premises at 2519 Belmont and west of it, there was a playhouse on an otherwise empty lot; that children used to play on the playhouse lot, some playing baseball and children of tender years playing such games as "it", "I got it", "tag", and "hops and coppers"; that the house at 2519 Belmont Avenue was in an extremely dilapidated condition; that the foundation settled on the east side of the house;



that there was no fence between the back yard of that house and the lot on which the playhouse was located, where the children used to play. In the operation of its real estate holdings in Chicago, the defendant maintained its own maintenance department, employing from ten to fifty people at a time to do the repair work on the properties owned by it. One Stanley R. Jalczynski was employed by defendant as a foreman, supervising the men doing various maintenance and repair work on the various buildings owned by it; that he and the men working under him were paid by the defendant and received their orders on all jobs from the real estate department in the main office of the defendant.

In September, 1935, and for sometime prior to the accident herein involved, workmen under the charge of Stanley R. Jalczynski, their foreman, were doing repair work on the house at 3519 Belmont Avenue. The house was settling and they were digging to put a new foundation on the east side. They had been excavating for four weeks, had brought and poured concrete, and were building up some shoring for the cement foundation. Three-fourths of the foundation on the east side of the house was repaired and about three-fourths of new siding was put in.

In the process of excavating, the ground that was dug out, was carried and piled up in mounds, partly in the back yard on the west side of the lot on which the house stood, and partly on the empty lot where the playhouse was located. These mounds were in some places as high as three feet. Also, there were heaps or mounds of ground in the center of the back yard, some as high as three feet, with glass, cans, pieces of wood and other debris mixed with the earth. There was no fence between the back yard of the house and the vacant lot where the playhouse was located and where the children used to play.

On September 12, 1935, the day of the accident, the reconstruction work was not finished and was left unguarded. The mounds

that there was no fence between the back yard of that house and the lot on which the playhouse was located, where the children used to play. In the operation of its real estate holdings in Chicago, the defendant maintained its own maintenance department, employing from ten to fifty people at a time to do the repair work on the properties owned by it. One Stanley J. Jakszynski was employed by defendant as a foreman, supervising the men doing various maintenance and repair work on the various buildings owned by it; that he and the men working under him were paid by the defendant and received their orders on all jobs from the real estate department in the main office of the defendant.

In September, 1935, and for sometime prior to the accident herein involved, workmen under the charge of Stanley J. Jakszynski, their foreman, were doing repair work on the house at 1510 Belmont Avenue. The house was settling and they were trying to put a new foundation on the east side. They had been excavating for four weeks, had brought and poured concrete, and were building up some shoring for the cement foundation. Three-fourths of the foundation on the east side of the house was repaired and about three-fourths of new siding was put in.

In the process of excavating, the ground that was dug out, was carried and piled up in mounds, partly in the back yard on the west side of the lot on which the house stood, and partly on the empty lot where the playhouse was located. These mounds were in some places as high as three feet. Also, there were mounds or mounds of ground in the center of the back yard, some as high as three feet, with glass, cans, pieces of wood and other debris mixed with the earth. There was no fence between the back yard of the house and the vacant lot where the playhouse was located and where the children used to play.

On September 12, 1935, the day of the accident, the reconstruction work was not finished and was left unguarded. The mounds

or heaps were visible from the public alley and the vacant lot where the children's playhouse was located. The plaintiff, a boy five years and nine months old, was on the playhouse lot riding on a tricycle, saw the mounds or heaps of ground in the back yard of the house in question and, as he testified at the trial, he wanted to go up and down the hills and for that purpose went to the yard on his tricycle. He went up a hill and as he did, the ground slid under him and he fell, cutting his right wrist either by the tin cane or the glass which were mixed in the heap of ground. He was immediately taken to the Belmont Hospital for first aid, and on the same day was transferred to the St. Mary's Hospital where Dr. A. Warszewski performed an operation. The medical examination disclosed that there was a wide laceration across the wrist, the cut extending from the skin to the bone and severing practically all of the soft tissue in the wrist. The cut was through the tendon and nerve that controlled the flexing of the wrist. All the flexor tendons were cut through to the bone. An operation was performed on his wrist, during the course of which the tendons were sutured, and the subcutaneous tissue was brought together and a cast was applied. He remained in St. Mary's Hospital for a week. Afterward, the attending surgeon visited the boy for a period of five months, first daily and then two or three times a week after that. He was given physiotherapy treatments for about five months which brought about considerable improvement. The last time that the attending surgeon examined the boy, was two years before the trial. He found inability to extend the wrist and keep it in a flexed condition. In his opinion, the condition of the wrist, as he saw it then, was permanent. Thereafter, Dr. Joseph F. Korecki, who first saw the plaintiff in 1937, treated the child in an attempt to improve the condition of the wrist, and performed several tests which disclosed impairment or weakening of the flexor of the right wrist. Dr. Korecki examined the boy on the day of the trial and found an increase in the deficiency of the right forearm, wrist and hand. It was his opinion



of hands were visible from the double elbow and the wrist joint above  
the children's shoulders was located. The plaintiff, a boy five years  
and nine months old, was on the day of the accident on a bicycle,  
near the wounds of hands of arms in the back yard of the house in  
question and, as he testified at the trial, he wanted to go up and  
down the hills and for that purpose went to the yard on his bicycle.  
He went up a hill and as he did, the ground slid under him and he fell,  
cutting his right wrist about by the time he was on the place which  
were mixed in the heap of ground. He was immediately taken to the  
Belmont Hospital for first aid, and on the same day was transferred  
to the St. Mary's Hospital where Dr. A. W. Warrington performed an  
operation. The medical examination disclosed that there was a wide  
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examined the boy on the day of the trial and found an increase in the  
deficiency of the right forearm, wrist and hand. It was his opinion

that the condition of mobility was permanent.

Plaintiff contends that when the trial court directed a verdict for the defendant at the close of all the evidence and entered judgment for the defendant notwithstanding the verdict of the jury, such action was tantamount to a holding as a matter of law that no attractive nuisance was present, and that there was no negligence on the part of the defendant or its agents upon which the verdict could be based - that the plaintiff's injury was damnum absque injuria. Upon the question as presented here, the plaintiff's evidence and testimony of witness must be viewed in the light most favorable to plaintiff and be given the benefit of all reasonable inferences and intendments. (Cooper v. Safeway Lines, 304 Ill. App. 302). It is urged by plaintiff that it should readily become apparent from a resume of the salient factors of the testimony that the trial Judge erred in holding as he did. That the childish mind is attracted and its curiosity aroused by the presence of some novel situation and entertainment, cannot be doubted. Plaintiff contends that the record discloses that the condition which existed on the premises in question was one calculated to intrigue the infantile mind of plaintiff and to attract him to the premises for his own pleasures; and that the fact that other children had been using the hills to coast down on wagons and bicycles, alone would seem to be conclusive of the factors of attraction, and notice to defendant of existing conditions. Plaintiff points to the three feet high hills of dirt, littered with glass, tin cans, etc., created by defendant's agents, with no guard rail or other warning device placed around these "dump" piles, although they were open to the view of the children playing nearby; that there was no fence between the back yard of the premises in question and the vacant lot immediately adjacent to it, which back yard and vacant lot the children had for some time been using daily as a playground for their various games.





The answer of defendant to plaintiff's contention is that the court did not err in sustaining defendant's motion for a directed verdict at the close of all the evidence, but that the court should have sustained defendant's motion for directed verdict at the close of plaintiff's evidence, and that the entry of judgment notwithstanding the verdict was not error. Defendant urges that plaintiff's evidence tends to show that the proximate cause of his injury was the fall from the tricycle on which he was riding; that his proof is silent, however, concerning the size of the tricycle, whether it was large or small, whether it was of such a size as could be safely ridden by plaintiff, and whether it was in such state of repair that it could be ridden safely. Nor was there any proof, it is urged, that plaintiff had had any experience in riding tricycles, or that his experience had been sufficient to enable him to ride down piles of dirt such as those in question with safety; that the evidence concerning the presence and location of tin cans and glass was very meagre. The plaintiff testified that there were only several tin cans but that he saw a lot of glass. He could not remember if there were tin cans on the piles of dirt. His brother testified that there were many tin cans and some glass in the back yard, and that there was glass from broken bottles.

The question, therefore, is largely one of fact, and the facts here before the court must be considered to determine whether plaintiff was entitled to recover on the theory that defendant maintained an attractive nuisance. The question is, of course, as to whether the doctrine of attractive nuisance is to be applied. In Burns v. City of Chicago, 338 Ill. 89, one of the cases cited, the court in discussing the conditions under which the doctrine of attractive nuisance can be invoked, quotes with approval from the case of Follett v. Illinois Central Railroad Co., 288 Ill. 508, where the court said:

"The cases fall into two classes: First, where the injury results from some dangerous element a part of or inseparably connected with the alluring thing or device, as in the turntable

the answer of defendant to plaintiff's contention is that the court did not try to ascertain defendant's position in a disputed verdict at the close of all the evidence, but that the court should have sustained defendant's motion for a directed verdict at the close of plaintiff's evidence, and that the entry of judgment notwithstanding the verdict was not error. Defendant argues that plaintiff's evidence tends to show that the proximate cause of his injury was the fall from the tripole on which he was riding; that his proof is direct, however, concerning the size of the tripole, whether it was large or small, whether it was of such a size as could be safely ridden by plaintiff, and whether it was in such state of repair that it could be ridden safely. But was there any proof, it is asked, that plaintiff had had any experience in riding tripoles, or that his experience had been sufficient to enable him to ride down hills of dirt such as those in question with safety; that the evidence concerning the presence and location of tin cans and glass was very meagre. The plaintiff testified that there were only several tin cans but that he saw a lot of glass. He could not remember if there were tin cans on the other of hill. His brother testified that there were many tin cans and some glass in the back yard, and that there was glass from broken bottles.

The question, therefore, is fairly one of fact, and the facts here before the court must be considered to determine whether plaintiff was entitled to recover on the theory that defendant maintained an attractive nuisance. The question is, of course, as to whether the doctrine of attractive nuisance is to be applied. In Turner v. City of Chicago, 228 Ill. 62, one of the cases cited, the court in discussing the conditions under which the doctrine of attractive nuisance can be invoked, quotes with approval from the case of Oliver v. Illinois Central Railroad Co., 228 Ill. 608, where the court said:

"The cases fall into two classes: first, where the injury results from some dangerous object a part of or inseparably connected with the plaintiff's thing or activity, as in the Turner case;



cases, where children may be killed or injured while playing with the thing on account of its dangerous nature; second, where the attractive device or thing is so located or situated that in yielding to its allurements the child, without such intervention of another element as breaks the relation of cause and effect, is brought directly in contact with danger from some independent source which occasions the injury."

The plaintiff suggests, however, that construing the plaintiff's testimony and that of his witnesses, even without enhancing it by lending to such testimony the benefit of all inferences and intendments, we have here a number of hills of dirt approximately three feet high, littered with glass, tin cans and rubbish, which were created by defendant's agents in excavating and rebuilding in the process of raising up the foundation of the building on the premises for approximately three-fourths of its length. No guard rail or other warning device had been placed around these "dump" piles, although they were open to the view of children playing nearby. There was no fence between the back yard of the premises in question and the vacant lot adjacent thereto, which for some time many children had been using as a playground. The children had been in the habit of playing there daily, and from that playground could view the back yard of the premises in question.

The doctrine of attractive nuisance requires that the attraction be visible from a public place or a place where children have a right to be. Plaintiff contends that it was shown by the testimony of Stanley Jalozyński, who was employed by defendant for the purpose of supervising the repair work on the premises, that such work had commenced sometime in July or August of 1935, and by the testimony of others that for some time children had been using the hills as a medium for entertainment. It is urged that the presence alone of the children on the lot next door and in the playhouse on that lot was sufficient notice to defendant of such presence and their proximity to the dangers existing in the back yard at 3519 Belmont, and the case of Ramsay v. Tuthill Material Company, 295 Ill. 395, pointed to. In that case defendant maintained on its premises an elevated switch track beneath which were bins constructed in the trestle-work for



cases, where children may be killed or injured while playing with the thing on account of its dangerous nature; second, where the attractive device or thing is so located or placed that it is likely to attract the child, without any intention of causing injury as breaks the relation of cause and effect, in causing injury in contact with danger from the independent source which constitutes the injury."

The plaintiff argues, however, that defendant's negligence is testified to such testimony the benefit of all inferences and inductions, we have here a number of hills of dirt approximately three feet high, littered with glass, tin cans and rubbish, which were created by defendant's agents in excavating and rebuilding in the process of raising up the foundation of the building on the premises for defendant's three-fourths of its length. No work was done or other warning devices had been placed around these "hills" since, although they were open to the view of children playing nearby. There was no fence between the back yard of the premises in question and the vacant lot adjacent thereto, which for some time many children had been using as a playground. The children had been in the habit of playing there daily, and from that playground could view the back yard of the premises in question.

The doctrine of attractive nuisance requires that the attraction be visible from a public place or a place where children have a right to be. Plaintiff contends that it was shown by the testimony of Stanley J. Jankowski, who was employed by defendant for the purpose of supervising the repair work on the premises, that such work had commenced sometime in July or August of 1935, and by the testimony of others that for some time children had been using the hills as a medium for entertainment. It is urged that the presence of the children on the lot next door and in the playhouse on that lot was sufficient notice to defendant of such presence and their proximity to the dangers existing in the back yard at 3513 Belmont, and the case of Young v. Lupton Amusement Company, 255 Ill. 582, pointed to. In that case defendant maintained on its premises an elevated switch track beneath which the line constructed in the track-work for

the purpose of holding sand. The bottom of the bins were about eight feet above the ground, and were reached by a ladder. The deceased, ten years of age, came onto the premises, climbed the ladder and when he was playing in the sand, slid into an opening in the bottom of the bin and was smothered to death. The court there said;

"It is not necessary, to make a defendant liable, that the attractive and dangerous thing should be visible from the street and that children should have been attracted to the premises by it. If an owner maintains dangerous conditions upon his premises to which he permits children to come he must use ordinary care to guard them against danger which their youth and ignorance prevent them from appreciating. There is no implied invitation from the mere existence of a dangerous attraction which is not discoverable off the premises, but if to the knowledge of the owner children habitually come upon his premises where a dangerous condition exists to which they are exposed, the duty to exercise care for their safety arises, not because of an implied invitation but because of his knowledge of unconscious exposure to danger which the children do not realize."

The Ramsey case was cited and approved by this court in Cicero State Bank v. Dolesse and Shepard Co. 298 Ill. App. 290. See also Wolczek v. Public Service Co., 342 Ill. 482.

The question as to whether the plaintiff sustained an injury on the premises in question and in determining whether or not the doctrine of attractive nuisance will be applied and the defendant held liable, the Hurns case (supra) is again called to our attention by defendant. There the Supreme Court said;

"To say that whenever the claim is made that an injury to children engaged in play has been occasioned by a dangerous agency the case must always be submitted to the jury to determine whether there was an element of attractiveness present is going too far. The situation has been aptly expressed in a recent Minnesota case, in which the court said: 'To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity he can make a plaything out of almost anything and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents of the children themselves.' Erickson v. Minneapolis St. Paul & Sault Ste. Marie Railroad Co., 165 Minn. 106, 205 N. W. 889."

The plaintiff in this action contends that the attractive nuisance charge, when proved, is but a circumstance bearing upon the question of the negligence of the defendant, and proof of the existence







of an attractive nuisance is not a prerequisite to recovery. That under the pleading of this case, it was merely necessary to make out a case of negligence against the defendant, and the question of whether or not the defendant was guilty of negligence was for the jury to determine, and cites Flis v. City of Chicago, 247 Ill. App. 128, wherein this court said;

"The plaintiff had the right to allege in his declaration as many grounds of recovery as he saw proper, but it was not necessary that he prove all of these. If he proved enough of the acts of negligence charged to make out a case it was sufficient. (Weber Wagon Co. v. Kehl, 139 Ill. 644, 656; Devine v. Delano, 272 Ill. 166; Wood v. Illinois Central R. Co., 185 Ill. App. 180, 184; Beivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 209). Plaintiff's intestate was only five years of age at the time of the accident and was therefore incapable of such conduct as would constitute contributory negligence. (Maskaliunas v. Chicago & W. L. R. Co., 316 Ill. 142, 149) and he was not a trespasser (Deming v. City of Chicago, supra; Stedwell v. City of Chicago, supra); and in our judgment, even if it be held that the kettle did not constitute an attractive nuisance, nevertheless, under the pleadings and the evidence in the case, the plaintiff made out a clear case of negligence against the defendant. The attractive nuisance charge, if proved, would be but a circumstance bearing upon the question of the alleged negligence of the defendant."

The defendant, in reply to plaintiff's contention, vigorously contends that the plaintiff's case was tried on the theory of attractive nuisance only, and urges that the complaint was drawn wholly on that theory. It is elementary as suggested that plaintiff can recover only on proof of the charges laid in his complaint. (Brodsky v. Frank, 342 Ill. 110; Hennett v. Ill. Power & Light Corp., 365 Ill. 564.) In the Frank case the Court said;

"A plaintiff must prove the case alleged in his declaration. He can recover only on the allegations of the declaration and not on a case not alleged, even though such a case is established by the evidence. A defendant has a right to know what the charges are, in order to properly make a defense and to prevent his being taken by surprise by evidence on the trial (Peder v. Midland Casualty Co., 316 Ill. 552)."

It is further suggested in support of the defendant's reply that it is elementary that a party cannot try a case on one theory in the trial court and on another theory in the court of review. (Chicago Title & Trust Co. v. DeLassaux, 336 Ill. 522). It does appear from the facts as presented that the occurrence complained of took





place on the premises alleged to have been owned by defendant. It is not alleged in plaintiff's complaint, nor is there evidence in the record which discloses that the plaintiff was on the premises in question at the invitation, express or implied, of the defendant. It does not appear from anything said in plaintiff's brief that the presence of plaintiff was not that of a trespasser. Under the facts as they appear in the record, the defendant was under no obligation to keep the premises in any particular state or condition to promote plaintiff's safety, and, as was said in McDermott v. Burke, 256 Ill. 401;

"It is an unquestioned general rule that the owner or occupier of private grounds is under no obligation to keep them in any particular state or condition to promote the safety of trespassers, intruders, idlers, bare licensees, or others who come upon them without any invitations either express or implied; and this general rule applies equally to adults and children."

The plaintiff being a trespasser, the defendant owed him no duty not to pile the excavated dirt in the back yard of the premises in question. As suggested, the only persons who could complain of piling the dirt there were the tenants who were in possession and control of the premises. But they are not complaining. As was said in Campion v. Chicago Landscape Co., 295 Ill. App. 225, "It is a fundamental principle in our law that negligence is a breach of duty and where there is no duty or breach there can be no negligence." Defendant criticizes the cases of Ellis v. City of Chicago, and Costello v. City of Aurora, 295 Ill. App. 510, and points out that they lay down no different rule. It does appear that in the Ellis case the tar kettle or boiler was being operated by defendant in a public street, a place where plaintiff's intestate had a right to be. Since he was not a trespasser, the defendant owed him a duty to exercise ordinary care for his safety. In the Costello case, the plaintiff's hand was injured by a Cannon ball falling from a pyramid of concrete which was maintained by defendant in one of its public parks, where the plaintiff had a right to be, and was not, therefore, a trespasser.



place on the premises alleged to have been owned by defendant. It is not alleged in plaintiff's complaint, nor is there evidence in the record which discloses that the plaintiff was on the premises at the time of the invitation, express or implied, of the defendant. It does not appear from anything said in plaintiff's brief that the presence of plaintiff was not that of a trespasser. Under the facts as they appear in the record, the defendant was under no obligation to keep the premises in any particular state or condition to promote plaintiff's safety, and, as was said in Wells v. Wells, 228 Ill. 401:

"It is an unqualified general rule that the owner or occupier of private premises is under no obligation to keep them in any particular state or condition to promote the safety of trespassers, intruders, liars, bare licensees, or others who come upon them without any invitation, either express or implied; and this general rule applies equally to adults and children."

The plaintiff being a trespasser, the defendant owed him no duty not to pile the excavated dirt in the back yard of the premises in question. As suggested, the only persons who could complain of piling the dirt there were the tenants who were in possession and control of the premises, but they are not complaining. As was said in Conroy v. Chicago Land & Ice Co., 228 Ill. 402, 403:

"It is a fundamental principle in our law that negligence is a breach of duty and where there is no duty or breach there can be no negligence." Defendant criticizes the cases of City of Chicago v. Conroy, 228 Ill. App. 510, and Conroy v. City of Chicago, 228 Ill. App. 510, and claims out that they lay down no different rule. It does appear that in the Conroy case the bar kettle or boiler was being operated by defendant in a public street, a place where plaintiff's interest had a right to be. Since he was not a trespasser, the defendant owed him a duty to exercise ordinary care for his safety. In the Conroy case, the plaintiff's hand was injured by a cannon ball falling from a pyramidal structure which was maintained by defendant in one of its public parks, where the plaintiff had a right to be, and was not, therefore, a trespasser.

Considering all the facts in the record it is clear that the property upon which this accident happened is private property, and there does not appear to be any duty which defendant owed plaintiff in defendant's use of such property. Hence, there being no duty to breach, there could be no negligence on the part of defendant, and, of course, there can be no recovery.

The plaintiff alleged in the complaint that the defendant was in possession and control of the house at 3519 Belmont Avenue, but it does not appear to be alleged that the defendant was in possession and control of the back yard of the premises where the accident complained of took place.

When we come to consider all of the facts and authorities cited in support of the questions involved, we are of the opinion that the court was justified in entering the order sustaining the defendant's motion for directed verdict at the close of the evidence, and in entering judgment for defendant notwithstanding the verdict of the jury. The trial court, in entering judgment for defendant notwithstanding the verdict of the jury, did not pass upon the motion for a new trial. In view of the recent decisions of the Supreme Court in the cases of Walsite v. C. R. I. & P. Ry. Co., 376 Ill. 59, and Goodrich v. Sprague, 376 Ill. 80, plaintiff admits the lack of jurisdiction of this Court to pass upon the motion for new trial undisposed of by the trial court and waives his request for this Court's decision on that point. Under these circumstances we have not considered this question at this time.

For the reasons stated, the judgment for defendant will be affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

Considering all the facts in the record it is clear that the property upon which this action has been brought is private property, and there does not appear to be any duty upon defendant to maintain it in defendant's use of such property. Hence, there being no duty to breach, there could be no negligence on the part of defendant, and, of course, there can be no recovery.

The plaintiff alleged in the complaint that the defendant was in possession and control of the house at 2515 Belmont Avenue, but it does not appear to be alleged that the defendant was in possession and control of the back yard of the premises where the complaint was made of such place.

When we come to consider all of the facts and circumstances offered in support of the questions involved, we are of the opinion that the court was justified in entering the order sustaining the defendant's motion for directed verdict at the close of the evidence, and in entering judgment for defendant notwithstanding the verdict of the jury. The trial court, in entering judgment for defendant notwithstanding the verdict of the jury, did not act upon the motion for a new trial. In view of the recent decision of the Supreme Court in the case of Adair v. Adair, 278 Ill. 65, 118 N.E. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

For the reasons stated, the judgment for defendant will

be affirmed.

REVEREND JUSTICE.

WILLIAM J. ANDERSON, J. CLERK.



41961

HARRY WANDKE,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

314 I.A. 381

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an action at law for the recovery of damages for personal injuries sustained by plaintiff while he was walking from a taxicab to the curb on Orchard Street in the City of Chicago. It is stated in the brief of the City that the plaintiff stepped on a piece of concrete in the street and fell, fracturing a bone in his ankle. The cause was tried before the court and a jury, and a verdict rendered in favor of plaintiff for \$1,000 upon which judgment was entered. Motions of defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were overruled.

It appears from the statement of facts that in 1938 the City tore up parts of the sidewalk in Orchard Street and replaced it with new sidewalk. The broken pieces of the old sidewalk were piled in the parkway between the sidewalk line and the curbing. The testimony conflicts concerning the time when the sidewalk was laid in front of 1624-26 Orchard street, the plaintiff stating that new sidewalk was laid in April of 1938 and the broken cement was piled in the parkway during April, May and June. Harold Simons, a witness for the defendant, testified that he was the watchman on the job and that the sidewalk was laid on June 4, 1938.

On June 5, 1938, the plaintiff, 41 years old, was living at 1626 N. Orchard Street. At about 4:00 o'clock in the morning he was returning from a wedding with a Mr. Rossi, in a taxicab. It was starting to get light; the cab driver stopped in front of 1624 Orchard Street; Mr. Rossi got out first and walked between two parked

Defendant,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

8141A.381

MR. JUSTICE BREWER delivered the opinion of the court:

This is an action at law for the recovery of damages for personal injuries sustained by plaintiff while he was walking from a taxi cab to the curb on Orchard Street in the City of Chicago. It is stated in the bill of the City that the plaintiff stepped on a piece of concrete in the street and fell, fracturing a bone in his ankle. The cause was tried before the court and a jury, and a verdict rendered in favor of plaintiff for \$1,000 upon which judgment was entered. Motion of defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were overruled.

It appears from the statement of facts that in 1938 the City tore up parts of the sidewalk in Orchard Street and replaced it with new sidewalk. The broken pieces of the old sidewalk were piled in the parkway between the sidewalk line and the curb. The testimony conflicts concerning the time when the sidewalk was laid in front of 1232-S Orchard Street, the plaintiff stating that new sidewalk was laid in April of 1938 and the broken concrete was piled in the parkway during April, May and June. Harold Adams, a witness for the defendant, testified that he was the workman on the job and that the sidewalk was laid on June 4, 1938.

On June 5, 1938, the plaintiff, 41 years old, was driving at 1232 S. Orchard Street. At about 4:00 o'clock in the morning he was returning from a wedding with a Mr. Rosal, in a taxi cab. It was starting to get light; the cab driver stopped in front of 1232 Orchard Street; Mr. Rosal got out first and walked between two parked

cars to the curbing; and the plaintiff, following him, stumbled on a piece of concrete and fell. Plaintiff testified that the piece of concrete was approximately 8 inches long and that it was of the same character as that piled on the parkway. He sustained injuries as a result of the fall, but, inasmuch as no point is here made concerning the size of the award, the nature and extent of his injuries are not set forth.

Photographs were introduced in evidence to show the condition of the street and sidewalk at the time of plaintiff's injuries. These photographs were taken on June 27, 1936. Caroline Shumaker, who lived at 1624 N. Orchard Street, testified, "I don't know for how long a period of time the condition as shown in the picture existed. My best judgment is two months, maybe." Rossi, plaintiff's companion at the time of the accident, testified that he "saw a lot of broken stones in the street", that "the material and pieces were laying on the curb and in the parkway and on the street when Mr. Wandke fell"; that he "saw the condition as shown in Plaintiff's Exhibits 1 and 2 a couple of weeks before the accident". He did not see Wandke fall and did not know what caused him to fall. On cross-examination he admitted that he did not know whether in the two weeks before the accident there was any material of any kind in the street adjacent to the curb. The photographs admitted in evidence over defendant's objections did not show the place where Wandke fell. Exhibit 1 shows the premises at 1622 Orchard Street, next door to the place of the accident, and in Exhibit 2, the place where he fell is concealed by the automobile in the picture.

It is the contention of defendant that there is a complete failure of proof that the defendant had actual or constructive notice of the presence of an obstruction in the street, and that in the absence of such proof the defendant is not liable as a matter of law for plaintiff's injuries. As we have already indicated, the record



came to the curb; and the plaintiff, following him, stepped on a piece of concrete and fell. Plaintiff testified that the piece of concrete was approximately 6 inches long and that it was of the same character as that piled on the highway. He sustained injuries as a result of the fall, but, inasmuch as no point is here made concerning the size of the sword, the nature and extent of his injuries are not set forth.

Photographs were introduced in evidence to show the condition of the street and sidewalk at the time of plaintiff's injuries. These photographs were taken on June 27, 1938. Caroline Thumacher, who lived at 1824 N. Orchard Street, testified, "I don't know for how long a period of time the condition as shown in the picture existed. My best judgment is two months, maybe." Next, plaintiff's companion at the time of the accident, testified that he "saw a lot of broken stones in the street", that "the material and stones were laying on the curb and in the highway and on the street when Mr. White fell"; that he "saw the condition as shown in plaintiff's exhibits 1 and 2 a couple of weeks before the accident". He did not see where the fall and did not know what caused him to fall. On cross-examination he admitted that he did not know whether in the two weeks before the accident there was any material of any kind in the street adjacent to the curb. The photographs admitted in evidence over defendant's objection did not show the place where White fell. Exhibit 1 shows the premises at 1824 Orchard Street, next door to the place of the accident, and in Exhibit 2, the place where the fall is recorded by the automobile in the picture.

It is the contention of defendant that there is a complete failure of proof that the defendant had actual or constructive notice of the presence of an obstruction in the street, and that in the absence of such proof the defendant is not liable as a matter of law for plaintiff's injuries. As we have already indicated, the record

shows that on June 5, 1938 plaintiff walked from a taxicab to the curb in front of 1624 Orchard Street, next door to his home. He tripped and fell because of a piece of concrete lying in the Street. The City contends that there is no evidence as to how long the piece of concrete lay there. Plaintiff testified that he had seen the material piled in the parkway in April, May and June, but he "never looked in the street to see if there was any material in the street"; and that before the night of the accident he had never seen any of this material in the street where he fell. The testimony of Plaintiff's witness, Rossi, contains no evidence showing how long the concrete was in the street.

The question, therefore, as we consider it, is one of fact from the evidence as to how long this concrete was on the premises in the parkway between the sidewalk and the curb line of the street. While there is evidence in the record that the pictures showed the conditions as they existed at the time of the accident, the evidence on the question of how long the material remained there is a question of fact. There is evidence that the pieces of concrete were lying in the parkway about two months, but defendant urges that there is no testimony that any pieces of concrete were in the street for any period of time prior to the date of the accident. Although it is not altogether clear as to how long the pieces of concrete were in the street, we still have the evidence showing that the broken pieces of concrete were in the parkway to the curb of the street. While the City is not an insurer against accidents, yet the question is did the City have actual or constructive notice and did not the conditions exist long enough to put the City authorities on notice that the condition was dangerous. As we have indicated, we are of the opinion that that is a question of fact for the jury. The fact is that the concrete was lying in the street and caused plaintiff to fall and sustain injuries. Plaintiff insists that when the defendant permitted the refuse concrete to remain piled immediately adjacent to the curb,

shows that on June 2, 1935, Plaintiff walked from a residence on the north  
in front of 1824 Oxford Street, went down to the street, he walked  
and fell because of a piece of concrete lying in the street. The  
City contends that there is no evidence as to how long the piece of  
concrete lay there. Plaintiff testified that he had seen the material  
piled in the parkway in April, May and June, but he never looked  
in the street to see if there was any material in the street; and  
that before the night of the accident he had never seen any of this  
material in the street where he fell. The testimony of Plaintiff's  
witness, Rossi, contains no evidence showing how long the concrete  
was in the street.

The question, therefore, as we consider it, is one of fact  
from the evidence as to how long this concrete was on the sidewalk  
in the parkway between the sidewalk and the curb line of the street.  
While there is evidence in the record that the witness passed the  
conditions as they existed at the time of the accident, the evidence  
on the question of how long the material remained there is a question  
of fact. There is evidence that the pieces of concrete were lying in  
the parkway about two months, but defendant urges that there is no  
testimony that any pieces of concrete were in the street for any period  
of time prior to the date of the accident. Although it is not altogether  
clear as to how long the pieces of concrete were in the street, we  
still have the evidence showing that the broken pieces of concrete  
were in the parkway to the curb of the street. While the City is not an  
insurer against accidents, yet the question is as the City has  
actual or constructive notice and did not the conditions exist long  
enough to put the City authorities on notice that the condition was  
dangerous. As we have indicated, we are of the opinion that that  
is a question of fact for the jury. The fact is that the concrete  
was lying in the street and caused Plaintiff to fall and sustain  
injuries. Plaintiff insists that when the defendant permitted the  
refuse concrete to remain piled immediately adjacent to the curb,



for the length of time as was done in the present case, the defendant municipality had constructive notice that in all probability such loose pieces of concrete would become scattered into the street. In the case of Reed v. City of Chicago, 309 Ill. App. 129, (an abstract opinion) it was said by this court;

"The City argues that children playing in the neighborhood might have caused pieces of concrete to fall over and upon the sidewalk and it is urged that this would constitute an intervening cause tending to relieve the City of liability. This contention is untenable, however, because the evidence showed that the dangerous condition of the sidewalk had existed for several weeks before the accident and the City foreseeing the danger of permitting these piles of debris to remain upon the sidewalk should have protected pedestrians who were rightfully upon the sidewalk from danger". "The City had been repaving the street north of Armitage Avenue, and its employees had taken the concrete, madadam and stones from the street and placed them in piles along the curb."

In that case the plaintiff "stumbled upon a piece of concrete which was on the sidewalk and sustained the injury. \* \* \*", and the case is somewhat analagous to the facts in the present record. We are of the opinion that the question of notice to the City was one of fact for the jury to pass upon. In Muesig v. Hart, 283 Ill. App. 115, a case which has some bearing on the question in the instant case, the court said;

"Vehicles had the right to use the highway from curb to curb, and even if the plank customarily lay near the curb, it nevertheless, in that position, constituted a dangerous obstruction. Heavy rains might cause it to float away from the curb, or a vehicle might strike it a glancing blow as it lay near the curb and cause it to be moved farther out into the road and into the path of passing cars. The jury were justified in finding that the accident was caused by the automobile striking a timber upon McCormick road at a point where Arthur Avenue, if extended, would intersect that road, and they were further justified in finding that the timber was the one that was used by defendants Harz and Warfield for the purpose of enabling automobiles to cross over the curb and into their golf practice course. It is true, as defendants argue, that there is no direct evidence to show how or just when the timber was moved from the curb to the point on the roadway where the automobile hit it, but the jury were justified in finding, from all the facts and circumstances, that, shortly before the accident, a downpour of rain or the passing traffic on the road, or both, caused it to be moved from the curb to the point where the automobile hit it."

We have also to consider under the facts of this case, the question of contributory negligence on the part of plaintiff. It is suggested that the mere knowledge of the existence of a defect or dangerous condition in a sidewalk, does not make the user thereof

for the length of time we was alone in the present case, the defendant  
unlawfully had constructive notice that in all probability such  
loss of sight of concrete would become necessary from the street. In  
the case of Ward v. City of Chicago, 203 Ill. App. 113, (an overruled  
opinion) it was said by this court;

"The City argues that children playing in the neighborhood  
might have caused pieces of concrete to fall over and upon the side-  
walk and it is urged that this would constitute an intervening cause  
tending to relieve the City of liability. This contention is unavailing,  
however, because the evidence shows that the dangerous condition of  
the sidewalk had existed for several weeks before the accident and  
the City, possessing the danger of existing there after the accident  
to remain upon the sidewalk should have protected pedestrians who  
were rightfully upon the sidewalk from danger." The City had been  
regarding the street north of Madison Avenue, and its employees  
had taken the concrete, sidewalk and stones from the street and placed  
them in piles along the curb."

In that case the plaintiff "suffered upon a piece of concrete which  
was on the sidewalk and sustained the injury." " " and the case is  
somewhat analogous to the facts in the present record. It is of  
the opinion that the question of notice to the City was not at issue  
for the jury to pass upon. In Ward v. City, 203 Ill. App. 113, a case  
which has been bearing on the question in the instant case, the court  
said;

"Vehicles had the right to use the sidewalk from curb to  
curb, and even if the plank curbside lay near the curb, it never-  
theless, in that position, constituted a dangerous obstruction. Heavy  
vehicles might cause it to float away from the curb, or a vehicle might  
strike it a glancing blow as it lay near the curb and cause it to be  
moved farther out into the road and into the path of passing cars.  
The jury were justified in finding that the accident was caused by  
the automobile striking a timber upon a concrete road at a point near  
Arthur Avenue, it is contended, would intersect that road, and they were  
further justified in finding that the timber was the one that was  
used by defendant to cross over the sidewalk for the purpose of crossing  
automobiles to cross over the curb and into their half section across.  
It is true, as defendant argues, that there is no direct evidence to  
show how or just when the timber was moved from the curb to the point  
on the roadway where the automobile hit it, but the jury were justified  
in finding, from all the facts and circumstances, that, shortly  
before the accident, a defendant of rain or the passing traffic on the  
road, or both, caused it to be moved from the curb to the point  
where the automobile hit it."

We have also to consider under the facts of this case, the  
question of contributory negligence on the part of plaintiff. It is  
suggested that the mere knowledge of the existence of a defect or  
dangerous condition in a sidewalk, does not make the user negligent



guilty of contributory negligence as a matter of law, and the case of Wallace v. City of Farmington, 231 Ill. 232, cited. It appears from the opinion in that case that;

"The use of a defective sidewalk by a person who has knowledge of the defect is not negligence per se, and if, while walking upon that sidewalk such person is in the exercise of ordinary care for his or her safety, there may be a recovery in case of an injury."

We further find from the opinion in City of Mattoon v. Faller, 217 Ill. 273, that it is said;

"It is, however, well settled law in this State, that, where a man knows of a defect in a sidewalk and walks thereon, his doing so with such knowledge is not negligence per se, as matter of law. The fact that he goes upon the sidewalk with knowledge of the existing defect, is a circumstance to be taken into consideration by the jury with all the other facts and circumstances in determining the question, whether he was guilty of contributory negligence."

In the instant case the evidence does not indicate that the plaintiff had knowledge of the pieces of concrete lying in the street in front of his home or next to it, and, while he may not have seen it, it was not altogether his duty to examine the roadway to determine if it was safe to walk upon. The question of contributory negligence on his part is, however, a question of fact for the jury to decide. The jury, in passing upon the facts as presented to them, found the defendant guilty and assessed plaintiff's damages in the sum of \$1,000, and we are of the opinion that there is nothing in the record to suggest error in the finding of the jury.

The City criticizes some of the statements made in plaintiff's brief, but upon examination of the questions involved we are of the opinion that there was sufficient evidence to justify finding the City guilty as charged in the Complaint, and that the facts do not warrant the finding of contributory negligence on the part of plaintiff as a matter of law. The trial court did not err in refusing to direct a verdict and in denying defendant's motions for judgment notwithstanding the verdict for a new trial, and in arrest of judgment; and the judgment of the trial court is, therefore, affirmed.

AFFIRMED.

BURKE, P. J. AND KILEY, J. CONCUR.



...of contributory negligence as a matter of law, and the issue of

Malice v. City of Birmingham, 301 U.S. 101, 104, 105.

From the opinion in that case this:

"The use of a defective sidewalk in a place where the knowledge of the defect is not negligence for me, and it, while walking upon that sidewalk such person is in the exercise of ordinary care for his or her safety, there may be a recovery in case of an injury."

He further find from the opinion in Malice v. Birmingham, 301 U.S.

105, that it is said:

"It is, however, well settled law in this State, and, where a man knows of a defect in a sidewalk and walks thereon, and is injured so with such knowledge is not negligent, as a matter of law. The fact that he does not know the sidewalk is defective at the existing defect, is a circumstance to be taken into consideration by the jury with all the other facts and circumstances in determining the question, whether he was guilty of contributory negligence."

In the instant case the evidence does not indicate that the plaintiff

had knowledge of the absence of concrete lying in the street in front

of his home or next to it, and, while he may not have seen it, it was

not altogether his duty to examine the roadway to determine if it was

safe to walk upon. The question of contributory negligence in this

part is, however, a question of fact for the jury to decide. The jury,

in passing upon the facts as presented to them, found the defendant

guilty and assessed plaintiff's damages in the sum of \$1,000, and we

are of the opinion that there is nothing in the record to suggest

error in the finding of the jury.

The City criticizes some of the statements made in plaintiff's

brief, but upon examination of the questions involved we are of the

opinion that there was sufficient evidence to justify finding the

City guilty as charged in the complaint, and that the issue was not

whether the finding of contributory negligence on the part of plaintiff

as a matter of law. The trial court did not err in refusing to direct

a verdict, and in denying defendant's motion for judgment notwithstanding

the verdict for a new trial, and in awarding judgment; and the

judgment of the trial court is, therefore, affirmed.

ATTORNEYS

JOHN A. ...

46127

JOSEPH F. PEACOCK,

Appellee,

v.

LUCILLE A. SEARLES, ET AL,  
On Appeal of LUCILLE A. SEAR-  
LES, Appellant.

INTERLUATORY APPEAL

FROM DISTRICT COURT,

COOK COUNTY.

314 I.A. 381<sup>2</sup>

MR. JUSTICE KILEY delivered the opinion of the court.

This is an appeal from an interlocutory order of the Superior Court of Cook County appointing a receiver in a suit for closing a trust deed securing a second mortgage for \$1,500.00 upon real estate in Chicago, Illinois. The defendant defaulted in payment of <sup>part of</sup> the principal and interest and plaintiff sued declaring the entire debt due. A receiver was appointed September 29, 1941 on plaintiff's motion based on the complaint. Thereafter, on October 14, defendant filed a petition to vacate the order and charged lack of notice of plaintiff's motion and insufficiency of the complaint to warrant the appointment. On October 30, 1941, defendant filed her answer and on October 31 an amended petition to vacate the order of appointment, which amendment in addition to the original charges, stated that the premises were more than sufficient security, notwithstanding defaults, to protect plaintiff's debt and that the order of appointment in authorizing collection of all back rents held by the tenants in possession, exceeded the limits of the trust deed; and further, that no complainant's bond was required by the order and none had been filed. The trial court by order, on November 3rd, vacated the order of September 29th and appointed

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On Appeal of LUCILLE A. SEAR  
ET AL.

1881 A.D.

to try



a receiver on plaintiff's motion, authorized the collection of rents in accordance with the trust deed, and provided for receiver's and plaintiff's bonds. The trial court in that order also denied defendant's motion to vacate the order "again appointing" the receiver. An attorney for the receiver was appointed by order of November 10, over the objections of the defendant. The defendant has appealed from the order of November 3rd and assigns as error also the appointment of the attorney.

The defendant contends that the complaint is insufficient in substance and in its verification. No motion was directed at the verification in the trial court and we shall not consider the point.

The plaintiff had the burden of presenting facts in his complaint showing the necessity for the appointment. Frank v. Siegel, 263 Ill. App. 316. The appointment here was made solely on the allegations in paragraph 8 of the complaint, wherein, among other things, it is charged that general taxes for 1939 and 1940 are due and unpaid with interest, costs and penalties; that the premises are meager and scant security; that the rents, issues and profits are not being applied to the payment of taxes, interest or principal on the instant trust deed, or a prior trust deed; that it is necessary that a receiver be appointed to preserve the real estate and to collect the rents, issues and profits for the protection of the security.

When the receiver was originally appointed the defendant had no notice and the order of appointment was set aside. When the re-appointment was made on November 3rd, the court had before it the defendant's answer setting up as new matter that there was usury in the mortgage transaction; denying that the property was meager and scant security; and stating that its fair, reasonable value was \$25,000.00 more than sufficient

a receiver on plaintiff's motion, authorized the collection of rents in accordance with the trust deed, and provided for receiver's and plaintiff's bonds. The trial court in this order also denied defendant's motion to vacate the order "again appointing" the receiver. An attorney for the receiver was appointed by order of November 10, over the objections of the defendant. The defendant has appealed from the order of November 3rd and assigns as error also the appointment of the attorney.

The defendant contends that the complaint is insufficient in substance and in its verification. No motion was directed at the verification in the trial court and we shall not consider the point.

The plaintiff had the burden of presenting facts in his complaint showing the necessity for the appointment. Frank v. Steel, 283 Ill. App. 318. The appointment here was made solely on the allegations in paragraph 8 of the complaint, wherein, among other things, it is charged that general taxes for 1939 and 1940 are due and unpaid with interest, costs and penalties; that the premises are mesger and scant security; that the rents, issues and profits are not being applied to the payment of taxes, interest or principal on the instant trust deed, or a prior trust deed; that it is necessary that a receiver be appointed to preserve the real estate and to collect the rents, issues and profits for the protection of the security.

When the receiver was originally appointed the defendant had no notice and the order of appointment was set aside. When the re-appointment was made on November 3rd, the court had before it the defendant's answer setting up as new matter that there was money in the mortgage transaction; denying that the property was mesger and scant security; and stating that its fair, reasonable value was \$25,000.00 more than sufficient

security, notwithstanding the unpaid taxes. There was no reply to the answer, no evidence was heard but the receiver was reappointed. Aside from considerations of the answer, the allegation of the complaint as to meager and scant security, is insufficient to justify the appointment, even though the rents, issues and profits were pledged to secure the debt.

Frank v. Signal, 263 Ill. App. 316. The general allegation as to unpaid taxes is insufficient because there is no showing that the security was thereby endangered or that there was not still sufficient security for the debt. In Althaus v. Kuhn, 222 Ill. App. 324, cited by plaintiff to support his contention that the default in payment of taxes was sufficient to justify the appointment of a receiver, there were specific allegations of fact, in the complaint, of a prior lien giving the amount thereof and the amount of the defaulted taxes, from both of which danger to plaintiff's lien could be inferred. Here there are no such allegations and, accordingly, we believe the general allegations of unpaid taxes is insufficient to warrant the appointment. The mere statement of non-application of rents, issues and profits, charges nothing wrongful on the part of the defendant and the remaining allegation is a conclusion. The sum of the allegations does not meet the requirement of the rule that it is inherent in the nature of this proceeding that the necessity for the appointment of a receiver must be shown. Frank v. Signal, 263 Ill. App. 316.

We believe that the receiver in this case was improvidently appointed and the order is, therefore, reversed. This conclusion also disposes of the question of the appointment of the attorney for the receiver.

ORDER REVERSED.

BURKE, P. J. AND HIBEL, CONCUR.



[illegible]

41808

MARY B. SEVIER, Administratrix of )  
the Estate of Albert E. Sevier, )  
Deceased, )

Appellee, )

v. )

CHARLES M. THOMSON, Trustee of )  
Chicago and North Western Railway )  
Company, (substituted for Charles )  
P. Megan, Trustee), )

Appellant. )

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 382

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant under the provisions of the Federal Employers' Liability act to recover for the death of her husband, Albert E. Sevier; upon the first trial she had a verdict and judgment for \$15,000; a new trial was granted and this court, granting leave to appeal from that order, affirmed it. (305 Ill. App. (abst.) 165.) Upon the second trial plaintiff had a verdict and judgment for \$20,000, and this appeal is from that judgment.

Our former opinion outlines the facts substantially as follows. Between 9 and 10 o'clock on the night of May 21, 1937, defendant's southbound freight train consisting of 86 empty cars on which Sevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Buda, Illinois; Sevier was riding in the engine on the fireman's or east side of the train; he inquired of the engineer if he should drop off the train and investigate as to the cause of the stalling; the engineer assented to this and Sevier walked back to see what was wrong.

The evidence tends to show that Sevier decided to cut the train between the 36th and 37th cars. When a train must be cut in two under such circumstances it is uncoupled about the middle of the train and the engine then proceeds with the forward section to the next place on the line where there is a sidetrack

MARY B. BEVIER, Administratrix of  
the Estate of Albert E. Bevier,  
Deceased,

Appellee,

v.

CHARLES M. THOMSON, Trustee of  
Chicago and North Western Railway  
Company, (substituted for Charles  
P. Morgan, Trustee),  
Appellant.

COOK COUNTY.

SUPERIOR COURT.

APPEAL FROM

3141A.382

MR. PRESIDING JUDGE NORMALLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant under the

provisions of the Federal Employers' Liability act to recover for the death of her husband, Albert E. Bevier; upon the first trial she had a verdict and judgment for \$5,000; a new trial was granted and this court, granting leave to appeal from that order, affirmed it. (305 Ill. App. (dist.) 183.) Upon the second trial plaintiff had a verdict and judgment for \$20,000, and this appeal is from that judgment.

Our former opinion outlines the facts substantially as follows. Between 9 and 10 o'clock on the night of May 21, 1937, defendant's southbound freight train consisting of 86 empty cars on which Bevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Bush, Illinois; Bevier was riding in the engine on the fireman's or east side of the train; he inquired of the engineer if he should drop off the train and investigate as to the cause of the stalling; the engineer assented to this and Bevier walked back to see what was wrong.

The evidence tends to show that Bevier decided to cut the train between the 36th and 37th cars. When a train must be cut in two under such circumstances it is uncoupled about the middle of the train and the engine then proceeds with the forward section to the next place on the line where there is a sidetrack



and these cars are left there; the engine then returns to the rear section and, coupling on to it, hauls it to the sidetrack where the two sections are then coupled together and the train proceeds on its way. The evidence tends to show that Sevier followed the usual procedure in such cases, closing the angle cocks - one on the rear of the 36th car and the other on the front of the 37th car, then uncoupling the automatic air brakes between the two cars. Defendant says that at this point the next thing to do is to open the rear angle cock, thus setting the air brakes so the rear cars cannot move. Sevier crossed over to the engineer's or west side of the train; the engineer then backed up the train so as to take the strain off the draw bars and Sevier pulled the pin by using a lever on the side of the car, thus cutting the train at this point. When the process of cutting the train is completed the brakeman ordinarily signals the engineer to go ahead with the forward section of the train.

Defendant argues that plaintiff failed to set the brakes on the rear section by reopening the angle cock, which would set the brakes, and that as the result of this failure, when the cars were uncoupled the unbraked rear section started to move down hill and that to stop this Sevier went between the two sections and closed the angle cock on the car at the head of the rear section, thus stopping it - witnesses say suddenly, and that while doing this he was caught between the stopped rear section and the backing forward section and crushed to death.

The evidence showed that there were two movements backward of the train. The first enabled Sevier to pull the pin and uncouple the cars. The jury could properly believe that when this was done he signaled to the engineer with the lantern he was carrying that the train had parted. Defendant argues this signal was to back up, but there was testimony to the contrary. It

and these cars are left there; the engine then returns to the rear section and, coupling on to it, hauls it to the sidetrack where the two sections are then coupled together and the train proceeds on its way. The evidence tends to show that Sevier followed the usual procedure in such cases, closing the angle cooke - one on the rear of the 37th car and the other on the front of the 37th car, then uncoupling the auto tie air brakes between the two cars. Defendant says that at this point the next thing to do is to open the rear angle cooke, thus setting the air brakes so the rear cars cannot move. Sevier crossed over to the engineer's or rear side of the train; the engineer then backed up the train so as to take the strain off the draw bars and Sevier pulled the pin by using a lever on the side of the car, thus cutting the train at this point. When the process of cutting the train is completed the brakemen ordinarily signal the engineer to go ahead with the forward section of the train. Defendant argues that plaintiff failed to set the brakes on the rear section by reopening the angle cooke, which could set the brakes, and that as the result of this failure, when the cars were uncoupled the unbraked rear section started to move down hill and that to stop this Sevier went between the two sections and closed the angle cooke on the car at the head of the rear section, thus stopping it - witnesses say suddenly, and that while doing this he was caught between the stopped rear section and the backing forward section and crushed to death.

The evidence showed that there were two movements backward of the train. The first enabled Sevier to pull the pin and uncouple the cars. The jury could properly believe that when this was done he signaled to the engineer with the lantern he was carrying that the train had parted. Defendant argues this signal was to back up, but there was testimony to the contrary. It

would be hardly reasonable to believe that after the cars had been uncoupled Sevier would signal the engineer to back up, for there would then be no necessity for backing the forward section of the train. It would be much more reasonable to believe that the signal to the engineer was to indicate that the cut had been made so that the forward section could proceed on its way to the next siding.

This is not inconsistent with defendant's argument that Sevier, before uncoupling the cars, did not close the angle cock on the rear section and hence it commenced to move down the hill. Sevier could reasonably assume that when he uncoupled the cars and had so signaled the engineer, the forward section of the train would proceed southward and he could safely proceed to close the angle cock on the first rear section car thus stopping it, wholly unaware that the forward section, with no signal from the engine, was backing toward the rear section. This is supported by the fact that Sevier's back was toward the forward section, which backed between "20 and 60 feet" before it ran into the rear section which was braked to a standstill. If the forward section had not so backed the accident would not have happened.

In any event we cannot say that the jury could not reasonably accept plaintiff's version of the manner in which the accident happened. Certainly all reasonable men would not agree that the accident was caused solely by the negligence of Sevier and that there was no negligence on the part of the engineer of the train.

Plaintiff also says that defendant's rule 14 requires that a signal to back be acknowledged by the engineer with three short whistles of the engine, and that even if Sevier's signal to the engineer was a back-up signal this rule was violated by the engineer's failure to sound the whistle. In many cases in-



would be hardly reasonable to believe that after the cars had been uncoupled Sevier would signal the engineer to back up, for there would then be no necessity for backing the forward section of the train. It would be much more reasonable to believe that the signal to the engineer was to indicate that the cut had been made so that the forward section could proceed on its way to the next siding.

This is not inconsistent with defendant's argument that Sevier, before uncoupling the cars, did not close the angle cock on the rear section and hence it commenced to move down the hill. Sevier could reasonably assume that when he uncoupled the cars and had so signaled the engineer, the forward section of the train would proceed southward and he could safely proceed to close the angle cock on the first rear section car thus stopping it, wholly unaware that the forward section, with no signal from the engine, was backing toward the rear section. This is supported by the fact that Sevier's back was toward the forward section, which backed between "80 and 90 feet" before it ran into the rear section which was braked to a standstill. If the forward section had not so backed the accident would not have happened.

In any event we cannot say that the jury could not reasonably accept plaintiff's version of the manner in which the accident happened. Certainly all reasonable men would not agree that the accident was caused solely by the negligence of Sevier and that there was no negligence on the part of the engineer of the train.

Plaintiff also says that defendant's rule is repugnant to that a signal to back be acknowledged by the engineer with three short whistles of the engine, and that even if Sevier's signal to the engineer was a back-up signal this rule was violated by the engineer's failure to sound the whistle. In any case in-

volving similar facts judgments in favor of the plaintiffs were sustained. Waiswila v. Illinois Central R. Co., 220 Ill. App. 113, 118; Central R. Co. of N. J. v. Colasurdo, 192 Fed. 901; Gaffney v. N. Y. Consolidated R. Co., 220 N. Y. 34; Musgrove v. M. & L. S. Ry. Co., 259 Mich. 469; Lancaster v. Fitch, 239 S. W. (Texas Civ. App.) 265. In Roth v. Schaefer, 300 Ill. App. 464, 469, we said: "In a case based on defendants' claimed negligence it is not necessary that the evidence demonstrate such negligence, 'but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence'." (Citing Denny Bros. v. Goldblatt, 298 Ill. App. 325 and Union Pacific R. Co. v. Huxoll, 245 U. S. 535.)

Defendant argues at some length that there were reversible errors in the rulings of the trial court in the admission and exclusion of evidence. While some of these rulings might be open to slight objection, yet we find nothing of sufficient importance to demand a reversal.

Neither were there errors in the giving or refusing of instructions. They were for the most part passed upon and approved in our prior opinion in this case. (305 Ill. App. 165.)

We find no procedural errors which would require a reversal. The decisive questions presented relate to the facts, and as two juries in this case have found for the plaintiff and the verdict is reasonably consistent with the evidence, we would not be justified in reversing for a third trial.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

v. Illinois Central R. Co., 220 Ill. 272, 273, 118; Central R. Co. of N. J. v. Colorado, 122 Fed. 901; Gaffney v. N. Y. Consolidated R. Co., 220 N. Y. 24; Mearns v. M. & L. E. Ry. Co., 223 Mich. 429; Lanaster v. Fitch, 229 S. W. (Texas Civ. App.) 285. In Roth v. Schaefer, 300 Ill. 404, 405, we said: "In a case based on defendant's claimed negligence it is not necessary that the evidence demonstrate such negligence, but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence." (Citing Denny Bros. v. Goldblatt, 228 Ill. App. 225 and Union Pacific R. Co. v. Huxol, 245 U. S. 525.)

Defendant argues at some length that there were reversible errors in the rulings of the trial court in the admission and exclusion of evidence. While some of these rulings might be open to slight objection, yet we find nothing of sufficient importance to demand a reversal.

Neither were there errors in the giving or retaining of instructions. They were for the most part passed upon and approved in our prior opinion in this case. (303 Ill. App. 125.)

We find no procedural errors which would require reversal. The decisive questions presented relate to the facts, and as two juries in this case have found for the plaintiff and the verdict is reasonably consistent with the evidence, we would not be justified in reversing for a third trial. The judgment is affirmed.

ATTORNEY GENERAL



41846

CRITERION ADVERTISING CO., INC.,  
a corporation,

Appellant,

v.

CLEMENSEN'S FLORISTS &  
DECORATORS, INC., a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

314 I.A. 383

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment upon trial by the court wherein it claimed \$226 to be due from defendant to it for advertising services furnished pursuant to a contract between the parties. Defendant answered that it had exercised its right under the terms of the contract to terminate it and had paid plaintiff in full for all advertising furnished prior to the date of termination. No brief has been filed in behalf of the defendant.

The contract, dated April 6, 1937, authorized plaintiff to install and maintain certain poster panels in Chicago, advertising defendant's business, for which service defendant agreed to pay a certain amount per month for 36 months, commencing from the date of the completion of the placing of such panels at certain locations in Chicago. The contract also contained a provision as follows: "This contract may be cancelled at the end of the first twelve months of service by giving notice in writing to the Criterion Advertising Co., Inc. ninety days in advance of the expiration of the first twelve months of service and by paying an additional 35 cents per board per month for the period used."

The evidence before the trial court was a stipulation of the facts, with certain exhibits. It was agreed that the of commencing the services under the contract was May 24, 1937. In order for defendant to avail itself of the election to

CRITERION ADVERTISING CO., INC.,  
a corporation,

Appellant,

v.

OLENBERG'S FLORESTA &  
DECORATORS, INC., a corporation,

Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

3141A.583

MR. PRESIDING JUSTICE MORTIMER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment upon trial

by the court wherein it claimed 1928 to be due from defendant to it for advertising services furnished pursuant to a contract between the parties. Defendant answered that it had exercised its right under the terms of the contract to terminate it and had paid plaintiff in full for all advertising furnished prior to the date of termination. Its brief has been filed in behalf of the defendant.

The contract, dated April 6, 1927, authorized plaintiff to install and maintain certain poster panels in Chicago, advertising defendant's business, for which service defendant agreed to pay a certain amount per month for 36 months, commencing from the date of the completion of the placing of such panels at certain locations in Chicago. The contract also contained a provision as follows: "This contract may be cancelled at the end of the first twelve months of service by giving notice in writing to the Criterion Advertising Co., Inc. ninety days in advance of the expiration of the first twelve months of service and by paying an additional 35 cents per board per month for the period used." The evidence before the trial court was a stipulation of the facts, with certain exhibits. It was agreed that the contract was made May 24, 1927, and that the services under the contract were to be rendered in order for defendant to avail itself of the election to

the contract at the end of the first 12 months of service it was necessary for it to notify the plaintiff to this effect 90 days before that date, which would be on or before February 24, 1938. Such notice was not given until March 26, 1938.

Plaintiff replied to this notice by letter dated April 2, calling attention to the provisions in the cancellation clause of the contract and saying that notice received March 26 was too late to be effective, and that the contract would remain in effect for the full period of 36 months.

Defendant apparently agreed to this, as shown by its letter of October 3, 1938 to plaintiff in which it was admitted that the request for cancellation was not made in time, and also by the fact that it failed to pay an additional 35 cents for each advertising board per month for the period used if the contract was cancelled according to its terms. After this refusal by plaintiff to consider the contract cancelled, defendant for a time paid plaintiff for the services according to the agreement.

Subsequently, in September 1939, plaintiff brought suit against defendant for the sum then claimed to be due and owing under the contract, and in that case the court entered judgment for the plaintiff, which was afterwards paid in full by the defendant. In the instant case the facts as to this prior suit were stipulated and it was also agreed that all of the issues raised in the instant case were tried in the previous case and that there was no change in the circumstances between the case now presented and the case previously presented. It was also agreed that plaintiff furnished the services provided in the contract until the termination of the same by its terms. This suit is brought for the remaining installments coming due after the date the prior suit was filed.

Bour v. Kimball, 46 Ill. App. 327, involved facts almost identical with those in the present case. It was there held that



the contract at the end of the first 12 months of service it was necessary for it to notify the plaintiff to this effect 30 days before that date, which would be on or before February 24, 1938. Such notice was not given until March 6, 1938.

Plaintiff replied to this notice by letter dated April 2, calling attention to the provisions in the cancellation clause of the contract and saying that notice received March 26 was too late to be effective, and that the contract would remain in effect for the full period of 36 months.

Defendant apparently agreed to this, as shown by its letter of October 3, 1938 to plaintiff in which it was admitted that the request for cancellation was not made in time, and also by the fact that it failed to pay an additional 25 cents for each advertising board per month for the period used if the contract was cancelled according to its terms. After this refusal by plaintiff to consider the contract cancelled, defendant for a time paid plaintiff for the services according to the agreement.

Subsequently, in September 1939, plaintiff brought suit against defendant for the sum then claimed to be due and owing under the contract, and in that case the court entered judgment for the plaintiff, which was afterwards paid in full by the defendant. In the instant case the facts as to this prior suit were stipulated and it was also agreed that all of the issues raised in the instant case were tried in the previous case and that there was no change in the circumstances between the case now presented and the case previously presented. It was also agreed that plaintiff furnished the services provided in the contract until the termination of the same by its terms. This suit is brought for the remaining installments coming due after the date the prior suit was filed.

Bour v. Kimball, 46 Ill. App. 327, involved facts almost

identical with those in the present case. It was there held that

the privilege to terminate an advertising contract must be exercised according to its terms and that if notice is not given within the time provided in the contract such attempted cancellation is ineffectual. Another advertising case involving very similar facts and to the same effect is Railway Advertising Co. v. Posner, 71 N. Y. S. 742. See also Williston on Contracts, (Revised Edition) Vol. 3, §853 (note 14), which states the general rule to the effect that time is of the essence of options to terminate or cancel an existing contract.

Moreover, defendant in its letter of October 3, 1938, addressed to plaintiff, virtually admitted its obligations under the contract by stating that plaintiff knew it "will get your money anyway," although the letter indicated that defendant felt "provoked" toward plaintiff for not accepting the notice of cancellation, which defendant admitted was not in compliance with the cancellation clause.

For the reason that the notice of cancellation was not given in apt time the judgment of the trial court is reversed and judgment is entered in this court for plaintiff and against the defendant for \$226.

REVERSED AND JUDGMENT FOR PLAINTIFF HERE.

Matchett, J., concurs.  
O'Connor, J., dissents.

the privilege to terminate an advertising contract must be exercised according to its terms and that if notice is not given within the time provided in the contract such attempted cancellation is ineffectual. Another advertising case involving very similar facts and to the same effect is Railway Advertising Co. v. Fox, 171 N. Y. 2, 742. See also Williston on Contracts, (7th ed. Edition) Vol. 3, §223 (note 14), which states the general rule to the effect that time is of the essence of options to terminate or cancel an existing contract.

Moreover, defendant in its letter of October 3, 1938, addressed to plaintiff, virtually admitted its obligations under the contract by stating that plaintiff knew it "will get your money anyway," although the letter indicated that defendant felt "provoked" towards plaintiff for not accepting the notice of cancellation, which defendant admitted was not in compliance with the cancellation clause.

For the reason that the notice of cancellation was not given in apt time the judgment of the trial court is reversed and judgment is entered in this court for plaintiff and against the defendant for \$225.

REVERSED AND JUDGMENT FOR PLAINTIFF MADE.

McIntyre, J., concurs.  
O'Connor, J., dissents.

A in the contract.  
This suit is  
ag and after the date

Involved facts almost

It was there held that



41867

MARK D. KALISCHER,  
Appellant and Cross-Appellee,

v.

LUDWIG SUSSMAN, ROSE SUSSMAN  
and ADELPHI THEATRE CORPORATION,  
a corporation,  
Appellees and Cross-Appellants.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 383<sup>2</sup>

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint setting forth his association with defendant Ludwig Sussman in the management of the Adelphi Theatre Corporation, which operates a moving picture show; he asks for an accounting, asserting that Sussman had illegally received and appropriated moneys of the corporation by voting himself excessive salaries and \$1500 as a bonus; he asked that this bonus and moneys belonging to the corporation be returned to it, and for the appointment of a receiver for the corporation. Answers were filed in behalf of the defendants and the cause was referred to a master to take evidence and report his conclusions. Both parties appeal from the decree.

The master found that Sussman was the owner of 90 shares of stock of the theatre corporation, and plaintiff the owner of 30 shares, which aggregates the 120 shares issued; that for a time plaintiff drew a salary of \$25 a week and that Sussman drew \$100 a week, but beginning with 1936 Sussman's salary was increased to \$400 a week and plaintiff was not given any salary and was not permitted to participate in the operation of the theatre; the master found that a reasonable weekly salary paid to Sussman as manager of the theatre was not entitled to the bonus of \$1500 and should be returned to the theatre corporation. The master found that plaintiff, being a stockholder in the theatre company, is entitled to a voice 1

MARK D. KALLISCHER,  
Appellant and Cross-Appellee,

v.

LUDWIG BUSSMAN, ROSE BUSSMAN  
and ADDELPHI THEATRE CORPORATION,  
a corporation,  
Appellees and Cross-Appellants.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

3141A.3883

MR. PRESIDING JUSTICE McHUGHLY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint setting forth his associa-  
tion with defendant Ludwig Busman in the management of the  
Adelphi Theatre Corporation, which operates a moving picture  
show; he asks for an accounting, asserting that Busman had  
illegally received and appropriated moneys of the corporation  
by voting himself excessive salaries and \$500 as a bonus; he  
asked that this bonus and moneys belonging to the corporation  
be returned to it, and for the appointment of a receiver for the  
corporation. Answers were filed in behalf of the defendants and  
the cause was referred to a master to take evidence and report  
his conclusions. Both parties appeal from the decree.

The master found that Busman was the owner of 90 shares  
of stock of the theatre corporation, and plaintiff the owner of  
30 shares, which aggregates the 120 shares issued; that for a  
time plaintiff drew a salary of \$5 a week and that Busman drew  
\$100 a week, but beginning with 1936 Busman's salary was in-  
creased to \$400 a week and plaintiff was not given any salary  
and was not permitted to participate in the operation of the  
theatre; the master found that a reasonable weight should be  
paid to Busman as manager of the theatre work. This suit is  
was not entitled to the bonus of \$1500 and he, This suit is  
should be returned to the theatre corporation after the date  
found that plaintiff, being a stockholder  
involved facts. It  
It was there held that

penses of the theatre; also that some of the expenses of this litigation had been paid by the theatre corporation and that all of these expenses should be paid by Sussman, personally, and not by the theatre. The master refused to recommend that a receiver be appointed.

Objections were filed by both parties and exceptions were heard by the court. A decree was entered overruling all of the exceptions of plaintiff to the report. The decree sustained the exceptions filed by Sussman to that part of the report finding that \$150 a week was a reasonable salary to be paid to him as manager.

The master had also found that some of the expenses of this litigation had been paid by the theatre corporation and that these expenses should be paid by Sussman, personally. Defendants' exception to this finding was sustained by the chancellor, although in his opinion giving the reasons for his conclusions the chancellor said he found nothing at all in the record about the theatre paying out money for Sussman in this litigation but that if it did so Sussman should return it, as "this is his personal law suit." Apparently no showing was made as to what amount, if any, has been paid by the theatre.

The decree denied the prayer of the plaintiff for the appointment of a receiver for the Adelphi Theatre Corporation and denied his prayer for a dissolution of the corporation and the distribution of its assets and property. The decree also denied all other relief sought by plaintiff, except as to the finding that Sussman was not entitled to any bonus, and held that this should be returned to the corporation.

Plaintiff has appealed from the decree, except as to that part which orders the return of the bonus money, and defendants appeal from that part of the decree and also from that part which refused to dismiss plaintiff's amended complaint on the



expenses of the theatre; also that some of the expenses of this litigation had been paid by the theatre corporation and that if of these expenses should be paid by Gussman, personally, and not by the theatre. The master refused to recommend that a receiver be appointed.

Objections were filed by both parties and exceptions were heard by the court. A decree was entered overruling all of the exceptions of plaintiff to the report. The decree sustained the exceptions filed by Gussman to that part of the report finding that \$150 a week was a reasonable salary to be paid to him as manager.

The master had also found that some of the expenses of this litigation had been paid by the theatre corporation and that these expenses should be paid by Gussman, personally. Defendants' exception to this finding was sustained by the chancellor, although in his opinion giving the reasons for his conclusions the chancellor said he found nothing at all in the record about the theatre paying out money for Gussman in this litigation but that it did so Gussman should return it, as "this is his personal law suit." Apparently no showing was made as to what amount, if any, has been paid by the theatre.

The decree denied the prayer of the plaintiff for the appointment of a receiver for the Adelphi Theatre Corporation and denied his prayer for a dissolution of the corporation and the distribution of its assets and property. The decree also denied all other relief sought by plaintiff, except as to the finding that Gussman was not entitled to any bonus, and held that this should be returned to the corporation.

Plaintiff has appealed from the decree, except as to that part which orders the return of the bonus money, and defendants appeal from that part of the decree and also from that part which refused to dismiss plaintiff's amended complaint on the

ground that he came into court with unclean hands and has failed to establish any right to relief in equity.

Defendants argue that in the report of the corporate Federal income tax, fictitious salaries were given; that plaintiff, as treasurer of the theatre corporation, participated in making these "fictitious returns" for the purpose of defrauding the Federal Government, and hence does not come into this court with clean hands and his complaint for this reason should be dismissed. To this the plaintiff replies that these returns were prepared by the theatre's accountant, Wallace Mayer; that Sussman cannot raise that point in defense in this suit. Pomeroy in his Equity Jurisprudence (4th Ed.) vol. 1, § 399, says that the maxim concerning clean hands "is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation...." American University v. Wood, 216 Ill. App. 189, 196, (affirmed in 294 Ill. 186.) The only party who might object to any "fictitious" returns is the Federal Government, and certainly not one who profited thereby. We hold that the chancellor was right in deciding that such returns, even if fictitious, did not prevent plaintiff from seeking in a court of equity such relief as he thought himself to be entitled.

The chancellor properly sustained the objections to the finding of the master that \$150 a week was a reasonable salary for Sussman. There was evidence that plaintiff consented and approved the salaries paid to Sussman, beginning with November 1931. Plaintiff at that time, at a meeting of the board of directors, voted for and agreed to a salary of \$200 a week for Sussman as president and manager for the year 1932; and again

ground that he came into court with unclean hands and has failed to establish any right to relief in equity.

Defendants argue that in the report of the corporate Federal income tax, fictitious salaries were given; that plaintiff, as treasurer of the theatre corporation, participated in making these "fictitious returns" for the purpose of defrauding the Federal Government, and hence does not come into this court with clean hands and his complaint for this reason should be dismissed. To this the plaintiff replies that these returns were prepared by the theatre's accountant, Wallace Meyer; that Gussman cannot raise that point in defense in this suit. Brown in his Equity Jurisprudence (4th Ed.) vol. 1, § 399, says that the maxim concerning clean hands "is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation...."

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The chancellor properly sustained the objections to the finding of the master that \$150 a week was a reasonable salary for Gussman. There was evidence that plaintiff consented and approved the salaries paid to Gussman, beginning with November 1931. Plaintiff at that time, at a meeting of the board of directors, voted for and agreed to a salary of \$300 a week for Gussman as president and manager for the year 1931; and again



at the next annual meeting he voted for and agreed to a salary of \$300 a week for Sussman for the year 1933. He is now estopped from asking for an accounting with respect thereto. Klein v. Independent Brewing Ass'n., 231 Ill. 594, 616-617; Figge v. Bergenthal, 130 Wis. 594, 618-619, and other cases.

Evidence was taken before the chancellor as to the reasonableness of salaries for managing theatres. Whether this is proper practice where the matter has been heard before the master and he has made up his report, has not been discussed and we do not pass upon it. Central Ill. Service Co. v. Swartz, 284 Ill. 108; Barrows v. Connelly, 199 Ill. App. 448; Wall v. Stapleton, 177 Ill. 357.

Moreover, the court should not undertake to fix the salary of a corporate officer unless such salary is so palpably excessive as to work a fraud on the stockholders. Sussman gave almost all of his time to the management of the theatre, working on an average of 12 hours a day for 7 days in the week - booking films, supervising the house staff and deciding all the operating policies. As a result of Sussman's industrious efforts the value of a share of stock, which was \$50 in 1931 when plaintiff bought his interest in the corporation, increased until in December 1937 a share of stock was valued at \$304.

The record shows that in the latter part of 1935 Sussman told plaintiff he did not want him around the theatre any more, and in the year 1936 plaintiff did not spend any of his time there. At an annual meeting of the board of directors in October 1936 a resolution was passed removing plaintiff from the office of secretary and treasurer over his protest.

Sussman testified that he paid himself a bonus of \$1500 for 1936 but did not know how it was computed, and that this bonus was paid by authority of a directors' meeting. When any director who actually controls a board assumes to vote himself

at the next annual meeting he voted for and agreed to a salary of \$300 a week for Guesman for the year 1935. He is now employed from asking for an accounting with respect thereto. Klein v. Independent Brewing Ass'n., 231 Ill. 524, 618-617; Wicks v. Berenthal, 130 Wis. 594, 618-619, and other cases.

Evidence was taken before the chancellor as to the reasonableness of salaries for managing theatres. Whether this is proper practice where the matter has been heard before the master and he has made up his report, has not been discussed and we do not pass upon it. Central Ill. Service Co. v. Bawitz, 284 Ill. 108; Barrow v. Connelly, 199 Ill. App. 448; Hall v. Stapleton, 177 Ill. 557.

Moreover, the court should not undertake to fix the salary of a corporate officer unless such salary is so palpably excessive as to work a fraud on the stockholders. Guesman has almost all of his time to the management of the theatre, working on an average of 12 hours a day for 7 days in the week - booking films, supervising the house staff and deciding all the operating policies. As a result of Guesman's industrious efforts the value of a share of stock, which was \$0 in 1931 when plaintiff bought his interest in the corporation, increased until in December 1937 a share of stock was valued at \$304.

The record shows that in the latter part of 1935 Guesman told plaintiff he did not want him around the theatre any more, and in the year 1936 plaintiff did not spend any of his time there. At an annual meeting of the board of directors in October 1936 a resolution was passed removing plaintiff from the office of secretary and treasurer over his protest.

Guesman testified that he paid himself a bonus of \$500 for 1936 but did not know how it was computed, and that this bonus was paid by authority of a directors' meeting. When any director who actually controls a bonus assumes to vote himself

a bonus, a chancery court will, at the instance of any stockholder, set aside the transaction whether it was fair or unfair, Higgins v. Lansingh, 154 Ill. 301, 365-366. In Globe Woolen Co. v. Utica Gas & Electric Co., 224 N. Y. 483, it was held that the duty rests on a trustee to seek no harsh advantage, and cited Adams v. Burke, 201 Ill. 395, where it was said that where a chief stockholder induced his "dummies" to vote a large sum of money to him, this was the act of the chief stockholder and the action may be defeated in court. Many other cases are to the same effect, all of which support the action of the chancellor in decreeing that the bonus be returned to the corporation.

In plaintiff's briefs there is a suggestion that he was entitled to \$5200 salary for 1935, and that one-fourth of an alleged debt of \$4474.14 of Sussman to the corporation should be decreed to be paid directly to the plaintiff. The report of the master makes no finding as to these points and plaintiff filed no objection to this, except the general objection that the master erred in failing to find that Sussman's personal indebtedness to the theatre corporation should be returned to the corporation. There are also other general objections alleging that the master erred in failing to find that Sussman was incompetent and dishonest in the management of the theatre. These points are not argued.

The court properly ordered that the costs of the suit be taxed one-half against the plaintiff and one-half against the defendants.

The decree is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.



a bonus, a chancery court will, at the instance of any stockholder, set aside the transaction whether it was fair or unfair. Higgins v. Lannan, 184 Ill. 301, 365-366. In Globe Coal Co. v. Utica Gas & Electric Co., 204 N. Y. 483, it was held that the

duty rests on a trustee to seek no harsh advantage, and acted

Adams v. Burke, 201 Ill. 285, where it was said that where a

chief stockholder induced his "dummy" to vote a large sum of money to him, this was the act of the chief stockholder and the

action may be defeated in court. Many other cases are to the

same effect, all of which support the action of the chancellor in

decreeing that the bonus be returned to the corporation.

In plaintiff's briefs there is a suggestion that he was

entitled to \$2800 salary for 1935, and that one-fourth of an alleged debt of \$4474.14 of Swesman to the corporation should be

decree to be paid directly to the plaintiff. The report of the

master makes no finding as to these points and plaintiff filed

no objection to this, except the general objection that the master

erred in failing to find that Swesman's personal indebtedness to

the theatre corporation should be returned to the corporation.

There are also other general objections alleging that the master

erred in failing to find that Swesman was incompetent and dis-

honest in the management of the theatre. These points are not

argued.

The court properly ordered that the costs of the suit be

taxed one-half against the plaintiff and one-half against the

defendants.

The decree is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

41888

HERSCHEL H. CAMPBELL,  
Appellee,

v.

CHICAGO, BURLINGTON & QUINCY  
RAILROAD COMPANY, a corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 384<sup>1</sup>

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$15,000, entered upon the verdict of a jury in an action brought by plaintiff to recover damages for personal injuries sustained by him as the result of a collision between his automobile, which he was driving, and a freight train operated over defendant's tracks in Centralia, Illinois.

This is the second trial of this case. In the first trial the judgment in plaintiff's favor was for \$20,000. On appeal by defendant we reversed this and remanded the cause on the ground the verdict was against the manifest weight of the evidence. (305 Ill. App. 264.) In that opinion we described in detail the physical situation and the accident which happened about 10 o'clock in the evening of August 24, 1935. The freight train was going south at from 8 to 12 miles an hour; plaintiff was driving his automobile east on 5th street in Centralia; there was a collision between the two.

Plaintiff's complaint charged that the locomotive of the train was without any headlight; that no signal was given either by bell or whistle as it approached the 5th street crossing. In our former opinion we noted that there was conflicting evidence on these points and concluded that the finding of the jury that plaintiff was in the exercise of due care for his own safety and that defendant was guilty of negligence was against the manifest weight of the evidence. It is unnecessary to repeat what we said in that opinion.

HERSCHEL H. CAMPBELL,  
Appellee,

ARLINGTON  
UNION  
GOLD

CHICAGO, BURLINGTON & QUINCY  
RAILROAD COMPANY, a corporation,  
Appellant.

MR. PRESIDING JUSTICE MAURICE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$18,000, entered upon the verdict of a jury in an action brought by plaintiff to recover damages for personal injuries sustained by him as the result of a collision between his automobile, which he was driving, and a freight train operated over defendant's tracks in Centralia, Illinois.

This is the second trial of this case. In the first trial the judgment in plaintiff's favor was for \$20,000. On appeal by defendant we reversed this and remanded the cause on the ground the verdict was against the manifest weight of the evidence. (305 Ill. App. 284.) In that opinion we described in detail the physical situation and the accident which happened about 10 o'clock in the evening of August 24, 1935. The freight train was going south at from 8 to 12 miles an hour; plaintiff was driving his automobile east on 5th street in Centralia; there was a collision between the two.

Plaintiff's complaint charged that the locomotive of the train was without any headlight; that no signal was given either by bell or whistle as it approached the 5th street crossing. In our former opinion we noted that there was conflicting evidence on these points and concluded that the finding of the jury that plaintiff was in the exercise of due care for his own safety and that defendant was guilty of negligence was against the manifest weight of the evidence. It is unnecessary to repeat what we said in that opinion.



On the second trial the same witnesses testified for the plaintiff who testified on the prior trial and, with some slight differences, their evidence was virtually the same. An additional witness was produced by plaintiff at this trial but his testimony does not materially help plaintiff's case. He testified he was walking south on the west side of Chestnut street and when he reached a point about 150 feet north of 5th street he heard the rumbling noise of the train coming behind him; he turned and saw it when it was about 50 feet away; he saw plaintiff's automobile stop at the stop sign. This stop sign was 30 feet away from the track, and plaintiff himself testified that, looking north from where he stopped he could see at least 50 feet, and yet when he was about 10 feet from the track he shifted to second speed and then saw the engine, which was 10 or 12 feet from him. Plaintiff does not explain his failure to look north after he left the stop sign.

In addition to the witnesses who testified at the first trial that the whistle was sounding, the bell ringing and the headlight of the locomotive burning, three more witnesses were produced by defendant who said they saw the headlight burning and heard both the whistle and bell. We hold that in this second trial the manifest weight of the evidence is that the bell rang, the whistle sounded and the headlight was burning. The evidence to the contrary was largely negative in character. Provenzano v. I. C. R. Co., 357 Ill. 192, 196.

The instructions given by the court were virtually the same as those given on the first trial. As we said in our prior opinion, there was no substantial error in these.

Counsel for defendant argue earnestly that the trial court should have directed the jury to return a verdict for the defendant and that it was error to deny its motion at the close

On the second trial the same witnesses testified for the plaintiff who testified on the prior trial and, with some slight differences, their evidence was virtually the same. An additional witness was produced by plaintiff at this trial but his testimony does not materially help plaintiff's case. He testified he was walking south on the west side of Chestnut street and when he reached a point about 150 feet north of 5th street he heard the rumbling noise of the train coming behind him; he turned and saw it when it was about 50 feet away; he saw plaintiff's automobile stop at the stop sign. This stop sign was 30 feet away from the track, and plaintiff himself testified that, looking north from where he stopped he could see at least 50 feet, and yet when he was about 10 feet from the track he shifted to second speed and then saw the engine, which was 10 or 12 feet from him. Plaintiff does not explain his failure to look north after he left the stop sign.

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Provance v. I. G. R. Co., 257 Ill. 122, 123.

The instructions given by the court were virtually the same as those given on the first trial. As we said in our prior opinion, there was no substantial error in these.

Counsel for defendant argue earnestly that the trial court should have directed the jury to return a verdict for the defendant and that it was error to deny its motion at the close

of all the evidence to direct such a verdict. In view of the conflict in the evidence and of what we said in our former opinion the trial court could not have directed a verdict without weighing the variant testimony, and therefore properly left the facts to be determined by the jury. This court is also in the same position on this point and cannot remand with directions to the trial court to direct a verdict.

However, we are again of the opinion that the verdict is so manifestly against the weight of the evidence that the judgment must be reversed and the cause remanded for another trial, and it is so ordered.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.



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However, we are again of the opinion that the verdict is so manifestly against the weight of the evidence that the judgment must be reversed and the cause remanded for another trial, and it is so ordered.

REVEREND AND HONORABLE

WATCHETT and O'CONNOR, JJ., concur.

41905

FRANK KLOVAS,  
Appellee,  
  
v.  
  
STEVE WEDESKIS,  
Appellant.

APPEAL FROM  
  
MUNICIPAL COURT  
  
OF CHICAGO.

314 I.A. 384<sup>2</sup>

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$2,621 by confession on a note alleged to be signed by the defendant; on the same day garnishment proceedings were commenced against the Drovers Trust & Savings Bank and a judgment was entered against the garnishee on the answer of the bank for \$2,416.62, which was the amount defendant had to his credit in the bank.

Defendant moved the court to vacate the judgment against him and leave was granted to appear and defend. Two main defenses were presented, namely, that the signature on the note on which judgment by confession was entered was not his signature; that he was not indebted to the plaintiff in any sum whatever, and that even if the court should hold the signature was not forged, the evidence would show that the note was wholly without any good and valuable consideration.

Upon trial by the court without a jury both these issues were found against the defendant and the judgment against him by confession was affirmed. He appeals.

We are of the opinion that the manifest weight of the evidence supports both of these defenses.

Touching first on the defense of no consideration: Defendant lived with plaintiff and his wife for many years as a roomer and boarder; he was employed for a time by Armour & Co., and later by Wilson & Co., earning about \$30 a week; for about the first seven months of 1933 he was ill and did not work, and plaintiff says that the note, which is dated January 16, 1934,

41905

FRANK KLOVAS,  
Appellee,

v.

STEVE KENNEDY,  
Appellant.

CHICAGO, ILL.

OF CHICAGO.

31 A. 384

MR. PRESIDING JUSTICE MCKINLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$2,821 by confession on a

note alleged to be signed by the defendant; on the same day

garnishment proceedings were commenced against the Farmers Trust

& Savings Bank and a judgment was entered against the garnishee

on the answer of the bank for \$2,416.82, which was the amount

defendant had to his credit in the bank.

Defendant moved the court to vacate the judgment against

him and leave was granted to appear and defend. The main defenses

were presented, namely, that the signature on the note on which

judgment by confession was entered was not his signature; that

he was not indebted to the plaintiff in any sum whatever, and

that even if the court should hold the signature was not forged,

the evidence would show that the note was wholly without any

good and valuable consideration.

Upon trial by the court without a jury both these issues

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and later by Wilson & Co., earning about \$30 a week; for about

the first seven months of 1933 he was ill and did not work, and

plaintiff says that the note, which is dated January 16, 1934,



was given in payment for defendant's room and board during this time. Defendant testified that he paid plaintiff and his wife for his board and lodging during all of this time.

In August 1932 defendant had on deposit in the savings account of the Peoples National Bank & Trust Co., \$2,182.24; in June 1934, ~~before the date of the note in question,~~ defendant opened up another savings account in the Drovers Trust & Savings Bank with an initial deposit of \$650. This account was increased from time to time until in April 1940 it amounted to \$3,016.62. Both plaintiff and his wife knew of this savings account. Defendant says that about this time he was sick and thought he was going to die; that without any request on his part a lawyer came to see him and secured his signature to two papers. One of these was apparently a will, in which defendant left to plaintiff and his wife the larger part of his property. There is reason to believe that the other paper signed was a withdrawal slip directed to the Drovers bank authorizing it to turn over defendant's balance to plaintiff and his wife.

Plaintiff and his wife secured defendant's Drover bank account of \$3,016.62, but subsequently defendant repudiated this transaction and brought suit in the Municipal court to recover from them this amount with interest at 5 per cent. Thereupon they returned to defendant the principal sum. He later filed an amended statement of claim for interest from the time his money was withheld from him, together with attorney's fees. He also sought to recover moneys claimed to be loaned by him to plaintiff and his wife amounting to \$500, and gave them certain credits. Later, defendants in that case - Klovas and his wife, failing to answer, a judgment was entered against them in favor of defendant here - Wedeskie, for \$332.80.

was given in payment for defendant's room and board during this time. Defendant testified that he paid plaintiff and his wife for his board and lodging during all of this time.

In August 1932 defendant had on deposit in the savings account of the Peoples National Bank & Trust Co., \$182.24; in June 1934, ~~xxxxxx~~ defendant opened up another savings account in the Provera Trust & Savings Bank with an initial deposit of \$880. This account was increased from time to time until in April 1940 it amounted to \$7,016.62. Both plaintiff and his wife knew of this savings account. Defendant says that about this time he was sick and thought he was going to die; that without any request on his part a lawyer came to see him and secured his signature to two papers. One of these was apparently a will, in which defendant left to plaintiff and his wife the larger part of his property. There is reason to believe that the other paper signed was a withdrawal slip directed to the Provera bank authorizing it to turn over defendant's balance to plaintiff and his wife.

Plaintiff and his wife secured defendant's Provera bank account of \$7,016.62, but subsequently defendant repudiated this transaction and brought suit in the Municipal court to recover from them this amount with interest at 6 per cent. Thereupon they returned to defendant the principal sum. He later filed an amended statement of claim for interest from the time his money was withheld from him, together with attorney's fees. He also sought to recover money claimed to be loaned by him to plaintiff and his wife amounting to \$500, and gave them certain credits. Later, defendants in that case - Klovess and his wife, failing to answer, a judgment was entered against them in favor of defendant here - Wedekind, for \$382.80.

Counsel for defendant in his brief suggest that the trial court did not give sufficient weight to the defense of no consideration, and a remark made by the court would seem to afford some basis for this.

The note in question is dated January 16, 1934, and is for the face value of \$1,800, with interest at 6 per cent; at that time defendant had on deposit with the Peoples bank over \$2,000 and had opened an account with the Drovers bank which, as we have said, by April 1940 amounted to over \$3,000. Although plaintiff and his wife knew that defendant had these savings accounts, yet for over 6 and 1/2 years they made no demand on him for any indebtedness due on the note, or otherwise.

It is significant that it was not until after defendant had commenced suit in August 1940 to recover his money that the judgment by confession was entered against him on October 2, 1940. Moreover, in his suit against the Klovases in the Municipal court they were charged with having fraudulently obtained defendant's signature to the withdrawal slip on his bank. The return to defendant of the principal amount obtained by them, and the default judgment against them for the balance, was virtually an admission that the charges made in that suit were justified. Defendant, after recovering the money back from Klovases and his wife, redeposited the same in the Drovers bank from which it had been withdrawn by the Klovases', and it is that bank which plaintiff garnished. It is persuasively pointed out that if defendant had any knowledge at that time that plaintiff was holding his note or claiming that defendant owed him anything, <sup>and he wished to avoid payment,</sup> he would have deposited the money in another bank and not have informed plaintiff of this.

Although Klovases' wife and also her son testified that defendant was sick and out of work for a period of between 12 and



Counsel for defendant in his brief in reply to the trial court did not give sufficient weight to the defense of no consideration, and a remark made by the court would seem to afford some basis for this.

The note in question is dated January 16, 1934, and is for the face value of \$1,800, with interest at 8 per cent; at that time defendant had on deposit with the Peoples Bank over \$2,000 and had opened an account with the Provera Bank which, as we have said, by April 1940 amounted to over \$3,000. Although plaintiff and his wife knew that defendant had these savings accounts, yet for over 6 and 1/2 years they made no demand on him for any indebtedness due on the note, or otherwise.

It is significant that it was not until after defendant had commenced suit in August 1940 to recover his money that the judgment by confession was entered against him on October 2, 1940. Moreover, in his suit against the Klovas in the Municipal court they were charged with having fraudulently obtained defendant's signature to the withdrawal slip on his bank. The return to defendant of the principal amount obtained by them, and the default judgment against them for the balance, was virtually an admission that the charges made in that suit were justified.

Defendant, after recovering the money back from Klovas and his wife, redeposited the same in the Provera bank from which it had been withdrawn by the Klovas, and it is that bank which plaintiff garnished. It is persuasively pointed out that if defendant

had any knowledge at that time that plaintiff was holding the note or claiming that defendant owed him anything, he would have deposited the money in another bank and not have informed plaintiff of this.

Although Klovas' wife and also her son testified that defendant was sick and out of work for a period of between 12 and

18 months and paid nothing for board and lodging during this time, yet the more convincing evidence is that defendant, at most, was unemployed for about 7 months, and on the basis of plaintiff's own figures of \$40 per month for board and lodging, defendant could only have owed them \$280 for this period of unemployment. Defendant testified that during all of this period he paid for his board and lodging. He admitted he owed for a period of six months in 1940, for which he gave them credit of \$180 in his suit against them in the Municipal court.

Mr. Rounds, a handwriting expert, gave his opinion that the signature on the note in question was not the signature of the defendant but was a forgery. He presented photographed enlarged genuine signatures of the defendant and also the signature on the note which are in the record. He pointed out with great detail facts to support his conclusion that the signature on the note was a forgery.

Plaintiff also introduced an expert, who gave it as his opinion that the signatures which were admittedly genuine and that on the note were written by the same person. However, his testimony is less convincing than that of the expert who testified to the contrary. The expert for plaintiff testified that "I have made rather an informal examination here, \*\* My examination in here is simply a preliminary one, I only had the time that you saw me in the back there." Compared with the detailed and definite testimony of the expert presented by defendant the greater weight of the evidence supports defendant's claim that the signature on the note was not made by him.

Plaintiff in his brief renews his motion, which has twice been denied by this court, to dismiss the appeal on the ground that no attempt was made to file the report of the proceedings within 50 days after the filing of notice of appeal. The notice of appeal was filed April 4, 1941. Fifty days from that date

18 months and paid nothing for board and lodging during this time, yet the more convincing evidence is that defendant, at most, was unemployed for about 7 months, and on the basis of Plaintiff's own figures of \$40 per month for board and lodging, defendant could only have owed them \$280 for this period of unemployment. Defendant testified that during all of this period he paid for his board and lodging. He admitted he owed for a period of six months in 1940, for which he gave the credit of \$30 in his suit against them in the Municipal court.

Mr. Rounds, a handwriting expert, gave his opinion that the signature on the note in question was not the signature of the defendant but was a forgery. He presented photographs enlarged genuine signatures of the defendant and also the signature on the note which are in the record. He pointed out with great detail facts to support his conclusion that the signature on the note was a forgery.

Plaintiff also introduced an expert, who gave it as his opinion that the signatures which were admittedly genuine and that on the note were written by the same person. However, his testimony is less convincing than that of the expert who testified to the contrary. The expert for Plaintiff testified that "I have made rather an informal examination here. \*\* My examination in here is simply a preliminary one, I only had the time that you saw me in the back there." Compared with the detailed and definite testimony of the expert presented by defendant the greater weight of the evidence supports defendant's claim that the signature on the note was not made by him.

Plaintiff in his brief renounces his motion, which has twice been denied by this court, to dismiss the appeal on the ground that no attempt was made to file the report of the proceedings within 30 days after the filing of notice of appeal. The notice of appeal was filed April 4, 1941. Fifty days from that date



would be May 24, 1941. The Civil Practice act provides that an extension of time for filing the report may be made within the 50 days, and the record shows that such an extension was made on May 23, which was within the 50 days. We see no reason to change our opinion on the motions to dismiss the appeal.

Plaintiff says this court cannot consider the sufficiency of the evidence because no exceptions were taken to the entry of the judgment. Under §80 of the Civil Practice act such exceptions are not necessary. See also Travelers Ins. Co. v. Wagner, 279 Ill. App. 13.

We hold that the finding of the trial court was against the manifest weight of the evidence, and as the trial was by the court without a jury the judgment will be reversed without remanding.

REVERSED.

Matchett and O'Connor, JJ., concur.

would be May 24, 1941. The Civil Practice Act provides that an extension of time for filing the report may be made within the 30 days, and the record shows that such an extension was made on May 23, which was within the 30 days. We see no reason to change our opinion on the motion to dismiss the appeal.

Plaintiff says this court cannot consider the sufficiency

of the evidence because no exceptions were taken to the entry of the judgment. Under §80 of the Civil Practice Act such exceptions are not necessary. See also Travelers Ins. Co. v. Warner, 273 Ill. App. 13.

We hold that the finding of the trial court was against the manifest weight of the evidence, and as the trial was by the court without a jury the judgment will be reversed without re-

manding.

R. V. LEPD.

Matchett and O'Connor, JJ., concur.

41951

AMERICAN EXPORT LINES, INC.,  
a corporation,  
Appellant,

v.

THE FIRST NATIONAL BANK OF  
CHICAGO, a corporation,  
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

314 I.A. 385

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of the defendant in an action brought to recover \$2,285, alleging that defendant had paid this amount on a check which was payable to plaintiff on which the endorsement of its name had been forged by J. A. Henning, its agent.

The facts in this case are very much like those in Miller v. American Export Lines, Inc., 307 Ill. App. (abst.) 234. In that case, as here, the American Export Lines claimed that Henning had no authority to endorse a check which was made payable to it. There we did not pass upon this question as the evidence showed that Henning had sent to his employer virtually all of the money he had received from the check, and we affirmed the judgment against the American Export Lines.

In the instant case Henning received the check from the Chicago Motor Club, payable to plaintiff; Henning endorsed this and gave it to Thos. Cook & Son in exchange for 22 traveler's checks - each for \$100, and \$85 in cash. The Anspach Travel Bureau had previously given Henning a check for \$930 for advance traveling reservations and he had forwarded these funds to the New York office of plaintiff; subsequently these reservations were canceled and the Anspach agency asked for a refund; this was made by Henning through the proceeds of the Chicago Motor Club check in question, in the amount of \$930.

Another \$800 of the Cook traveler's checks were used to



41981

AMERICAN EXPORT LINES, INC.,  
a corporation,  
Appellant,

v.

THE FIRST NATIONAL BANK OF  
CHICAGO, a corporation,  
Appellee.

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

3141A.385

MR. PRESIDING JUSTICE NEWMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of the defendant in an action brought to recover \$385, alleging that defendant had paid this amount on a check which was payable to plaintiff on which the endorsement of its name had been forged by J. A. Henning, its agent.

The facts in this case are very much like those in Miller v. American Export Lines, Inc., 307 Ill. App. (dist.) 234. In that case, as here, the American Export Lines claimed that Henning had no authority to endorse a check which was made payable to it. There we did not pass upon this question as the evidence showed that Henning had sent to his employer virtually all of the money he had received from the check, and we affirmed the judgment against the American Export Lines.

In the instant case Henning received the check from the Chicago Motor Club, payable to plaintiff; Henning endorsed this and gave it to Thos. Cook & Son in exchange for 22 traveler's checks - each for \$100, and \$5 in cash. The Anapach Travel Bureau had previously given Henning a check for \$230 for advance traveling reservations and he had forwarded these funds to the New York office of plaintiff; subsequently these reservations were canceled and the Anapach agency asked for a refund; this was made by Henning through the proceeds of the Chicago Motor Club check in question, in the amount of \$230.

Another \$600 of the Cook traveler's checks were used to

purchase a money order for \$731, which Henning transmitted to plaintiff. The uncontradicted testimony shows that the balance of these Cook checks were used to pay the necessary and proper expenses of plaintiff's western passenger office which was in charge of Henning.

In an early Illinois case (Shaffner v. Edgerton, 13 Ill. App. 132,) it was held that even if an agent had no authority to endorse certain checks, yet if the amount of these was received by plaintiffs they will not be permitted to allege his want of authority. In Hamlin's Wizard Oil Co. v. U. S. Express Co., 184 Ill. App. 493, (affirmed in 265 Ill. 156), it was held that where the plaintiff actually got the benefit of certain checks and drafts, the defendant should be credited with them although they were bought with part of stolen proceeds.

Although what we have said justifies affirmance of the judgment, we might also say that defendant and Thos. Cook & Son had a right to rely upon the authority of Henning to endorse the check. He was the general passenger agent of plaintiff with headquarters in Chicago, soliciting passenger business for plaintiff; he planned complete itineraries, made hotel reservations, arranged for land transportation and purchasing of traveler's checks. To furnish these services to the traveling public he had authority to receive payments either in cash or by checks. His method of business was ordinarily to endorse checks payable to plaintiff with a rubber stamp, adding his own signature.

Henning's territory covered 21 states, and in securing business it was necessary for him to travel frequently. He was constantly complaining to the home office that there was not sufficient money allowed to him for these traveling expenses. Plaintiff ascertained that Henning was using for this purpose moneys which should have been forwarded to it, and on April 28,

purchase a money order for \$731, which Henning transmitted to plaintiff. The uncontradicted testimony shows that the balance of these Cook checks were used to pay the necessary and proper expenses of plaintiff's western passenger office which was in charge of Henning.

In an early Illinois case (Shaffner v. Robertson, 13 Ill. App. 132,) it was held that even if an agent had no authority to endorse certain checks, yet if the amount of these was received by plaintiffs they will not be permitted to allege his want of authority. In Hamlin v. Hamlin (184 Ill. App. 493, affirmed in 285 Ill. 133), it was held that where the plaintiff actually got the benefit of certain checks and drafts, the defendant should be credited with them although they were bought with part of stolen proceeds.

Although what we have said justifies allowance of the judgment, we might also say that defendant and Thos. Cook & Son had a right to rely upon the authority of Henning to endorse the check. He was the general passenger agent of plaintiff with headquarters in Chicago, soliciting passenger business for plaintiff; he planned complete itineraries, made hotel reservations, arranged for land transportation and purchasing of traveler's checks. To furnish these services to the traveling public he had authority to receive payments either in cash or by checks. His method of business was ordinarily to endorse checks payable to plaintiff with a rubber stamp, adding his own signature.

Henning's territory covered 21 states, and in securing business it was necessary for him to travel frequently. He was constantly complaining to the home office that there was not sufficient money allowed to him for these traveling expenses. Plaintiff ascertained that Henning was using for this purpose moneys which should have been forwarded to it, and on April 28,



1937, wrote him a letter directing him to remit directly to plaintiff's New York office all checks received by him. There is no evidence that Thos. Cook & Son or the defendant, First National Bank, ever had any knowledge of these instructions, and Henning testified that even after receipt of the letter he continued to operate the business, handling the funds exactly as he had been doing previously for years.

It has been held in many cases that secret instructions limiting the authority of an agent are not binding on one who has had dealings with the agent who was exercising powers within the apparent scope of his authority. Hodges v. Bankers Surety Co., 152 Ill. App. 372; Swisher v. Palmer, 106 Ill. App. 432, 436-437; Irvin v. Metropolitan-Hibernia Fire Ins. Co., 247 Ill. App. 562, 570; Home Life Ins. Co. v. Pierce, 75 Ill. 426, 435. The facts as to Henning's apparent authority were properly submitted to the jury.

Plaintiff criticizes certain of the instructions, but we find nothing of sufficient importance to require a reversal.

The evidence sustains the verdict, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

1937, wrote him a letter directing him to remit directly to Plaintiff's New York office all checks received by him. There is no evidence that Thos. Goon & Son or the defendant, First National Bank, ever had any knowledge of these instructions, and defendant testified that even after receipt of the letter he continued to operate the business, handling the funds exactly as he had been doing previously for years.

It has been held in many cases that secret instructions limiting the authority of an agent are not binding on one who has had dealings with the agent who was exercising powers within the apparent scope of his authority. Hodges v. Bankers Trust Co., 158 Ill. App. 372; Swisher v. Palmer, 108 Ill. App. 432, 433-437; Irvin v. Metropolitan-Northwestern Life Ins. Co., 247 Ill. App. 582, 570; Home Life Ins. Co. v. Pierce, 75 Ill. App. 456, 458. The facts as to Henning's apparent authority were properly submitted to the jury.

Plaintiff criticizes certain of the instructions, but we find nothing of sufficient importance to require a reversal. The evidence sustains the verdict, and the judgment is

affirmed.

APPROVED.

Matchett and O'Connor, JJ., concur.

41929

LAKE VIEW TRUST AND SAVINGS BANK, a  
corporation,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,  
Appellant.

30  
22  
APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 386<sup>1</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

February 9, 1934, plaintiff filed suit against defendant to recover \$25,530.64, balance said to be due upon a judgment rendered in a condemnation suit with interest. Defendant filed an answer March 28, 1934. November 6, 1936, an order was entered dismissing the suit. In March, 1941, plaintiff, under Section 72 of the Civil Practice Act, filed its petition in the nature of a motion for writ of error coram nobis to vacate the order of dismissal. The ground of the motion was stated by the petition to be that after suit was filed it was found a case was pending in the Supreme Court which involved the same question and the decision of which would finally determine whether plaintiff was entitled to recover in this suit. In view of this case the attorneys for plaintiff entered into an oral stipulation with the attorneys for defendant that if this case appeared on any trial call before the decision of the Supreme Court in the case there pending it should be stricken from the call, and further that judgment finally would be entered in the trial court in conformity with whatever the decision of the Supreme Court might be in the test case. November 6, 1936, the case appeared on a call of cases in the Circuit Court made under Section 5 of Rule 22, concerning cases not noticed for trial within two years after the beginning thereof. Each of the parties relied upon the oral stipulation. Neither appeared, and the suit was dismissed. Thereafter the test case in the Supreme Court was decided in favor of plaintiff. Upon the filing of this petition defendant made a



LAKE VIEW TRUST AND SAVINGS BANK, a  
corporation,  
Appellee,

CIRCUIT COURT,  
COOK COUNTY,

CITY OF CHICAGO, a Municipal Corporation,  
Appellant.

3141 A. 386

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

February 9, 1934, plaintiff filed suit against defendant to recover \$2,530.84, balance said to be due upon a judgment rendered in a condemnation suit with interest. Defendant filed an answer March 28, 1934. November 6, 1936, an order was entered dismissing the suit. In March, 1941, plaintiff, under Section 12 of the Civil Practice Act, filed its petition in the nature of a motion for writ of error coram nobis to vacate the order of dismissal. The ground of the motion was stated by the petition to be that after suit was filed it was found a case was pending in the Supreme Court which involved the same question and the decision of which would finally determine whether plaintiff was entitled to recover in this suit. In view of this case the attorneys for plaintiff entered into an oral stipulation with the attorneys for defendant that if this case appeared on any trial call before the decision of the Supreme Court in the case there pending it should be stricken from the call, and further that judgment finally would be entered in the trial court in conformity with whatever the decision of the Supreme Court might be in the test case. November 6, 1936, the case appeared on a call of cases in the Circuit Court made under Section 5 of Rule 22, concerning cases not noticed for trial within two years after the beginning thereof. Each of the parties relied upon the oral stipulation. Neither appeared, and the suit was dismissed. Thereafter the test case in the Supreme Court was decided in favor of plaintiff. Upon the filing of this petition defendant made a

motion to dismiss it. The motion was denied, the order of dismissal set aside and defendant appeals.

The petition showed the dismissal of a good cause of action because of a matter which, had it been called to the attention of the trial judge, would undoubtedly have prevented the entry of the order. On the authority of cases such as Jacobson v. Ashkinaze, 337 Ill. 141; Carsted v. Mills Novelty Co., 298 Ill. App. 275; Maniatis v. Carelin, 287 Ill. App. 154, and numerous other cases which might be cited, we hold the petition was sufficient and the court was justified in entering an order denying defendant's motion to dismiss it. The order reinstating the cause, however, further states that leave is denied defendant to file an answer to said petition. The filing of the petition was the beginning of a new suit. When the motion to dismiss it was denied defendant had a right to answer. (See Ill. Civil Practice Act, Chap. 110, §45; Hinton's Comment on Section 45 in Harrow's Ill. Practice Manual, p. 147, and the decision of the Appellate Court in Topel v. Personal Loan & Savings Bank, 290 Ill. App. 558).

For the error in denying defendant's right to answer the petition the judgment must be reversed and the cause remanded with directions to enter a rule on the defendant to answer the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

motion to dismiss it. The motion was denied, the order of dismissal set aside and defendant appealed.

The petition showed the dismissal of a good cause of action because of a matter which, had it been called to the attention of the trial judge, would undoubtedly have prevented the entry of the order. On the authority of cases such as Jacobson v. Ashkness, 237 Ill. 141; Garrett v. Mills Novelty Co., 238 Ill. App. 275; Sanitis v. Garfield, 237 Ill. App. 184, and numerous other cases which might be cited, we hold the petition was sufficient and the court was justified in entering an order denying defendant's motion to dismiss it. The order reinstating the cause, however, further states that leave is denied defendant to file an answer to said petition. The filing of this petition was the beginning of a new suit. When the motion to dismiss it was denied defendant had a right to answer. (See Ill. Civil Practice Act, Chap. 110, §42; Rinton's Comment on Section 42 in Harrow's Ill. Practice Manual, p. 147, and the decision of the Appellate Court in Tobel v. Personal Loan & Savings Bank, 290 Ill. App. 528).

petition. With directions to enter a rule on the defendant to answer the petition the judgment must be reversed and the cause remanded for the error in denying defendant's right to answer the petition.

REVERSED AND R EMBLEDED WITH LETTERS

Measures, P. 1, and O'Connor, J., 1968.



41948

SCHLOSSER'S BAKERIES, INC., a  
corporation, and LOUIS SCHLOSSER,  
Appellants,

v.

VILLAGE OF OAK PARK, a Municipal  
corporation, ROBERT F. McMASTER,  
President, and BENJAMIN BARSEMA,  
Chief of Police, of the Village  
of Oak Park,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 386<sup>2</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs, doing business in bakery goods in Chicago, opened a retail store in Oak Park. The corporation owned the business. Louis Schlosser was president of it. The store was kept open on Sundays, and its officials came in conflict with the village ordinance 75.46 of the Village Code, known as the Sunday Closing Ordinance. April 1, 1941, the chief of police caused a complaint to be filed against Louis Schlosser for violating the ordinance. A warrant issued, bond was given, trial set for April 4, 1941.

The day before the time set for trial (April 3) plaintiffs began this suit in equity for an injunction to restrain enforcement of the ordinance. The complaint set up the ordinance verbatim and alleged it was void and invalid. Judge Lewé issued a temporary injunction. There was notice of application for change of venue. The cause was transferred to Judge O'Connell. Defendants answered. The cause was heard on the pleadings. A decree was entered July 17, 1941, dissolving the injunction and dismissing the suit for want of equity. Plaintiffs gave notice of appeal July 28, 1941.

The trial judge stated reasons for his decision to be that courts of equity would not interfere by injunction where there was a complete and adequate remedy at law; that repetition of offenses could not justify the argument that equity would

SCHLOSSER'S BAKERIES, INC., a  
corporation, and LOUIS SCHLOSSER,  
Appellants,

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

V.  
VILLAGE OF OAK PARK, a Municipal  
corporation, ROBERT T. MEMASTER,  
President, and BENJAMIN BARBERA,  
Chief of Police, of the Village  
of Oak Park,  
Appellees.

314.386

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs, doing business in bakery goods in Chicago, opened a retail store in Oak Park. The corporation owned the business. Louis Schlosser was president of it. The store was kept open on Sundays, and its officials came in conflict with the village ordinance 75.48 of the Village Code, known as the Sunday Closing Ordinance. April 1, 1941, the chief of police caused a complaint to be filed against Louis Schlosser for violating the ordinance. A warrant issued, bond was given, trial set for April 4, 1941.

The day before the time set for trial (April 3) plaintiffs began this suit in equity for an injunction to restrain enforcement of the ordinance. The complaint set up the ordinance verbatim and alleged it was void and invalid. Judge Lewis issued a temporary injunction. There was notice of application for change of venue. The cause was transferred to Judge O'Connell. Defendants answered. The cause was heard on the pleadings. A decree was entered July 17, 1941, dissolving the injunction and dismissing the suit for want of equity. Plaintiffs gave notice of appeal July 28, 1941.

The trial judge stated reasons for his decision to be that courts of equity would not interfere by injunction where there was a complete and adequate remedy at law; that repetition of offenses could not justify the argument that equity would

intervene to prevent a multiplicity of suits. The court distinguished Eden v. The People, 161 Ill. 296 at 303, and City of Mt. Vernon v. Julian, 369 Ill. 447 at 453, on the ground that there the validity of the ordinances in question was tested in direct actions at law, while here the attempt was to challenge the ordinance by complaint in equity. We think the opinion of the trial judge was sound in law.

The cases are rare indeed in which a court of equity will use its extraordinary powers to interfere with officials entrusted with the enforcement of the law. Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372, 380, 381; High on Injunctions, §34; Kent v. City of Chicago, 301 Ill. App. 312, 314.

It is unnecessary on this record to analyze the cases since the record shows that, as a matter of fact, the questions have since the decision of the court become moot. The suit was dismissed July 17. Four days afterwards (on July 21, 1941) the proper authorities of the Village of Oak Park by an ordinance enacted as an amendment in effect repealed the ordinance involved in this suit and substituted for it another in substance quite different. The record in this case was filed August 4, 1941. September 18, 1941, by a paid advertisement in the local Oak Park paper plaintiff corporation stated that an ordinance such as had been passed by way of amendment and substitution "is unquestionably fair \* \* \* we intend to observe this ordinance \* \* \*." A letter to the same effect was distributed under date of September 16, 1941, to practically everybody in Oak Park. All these facts are made to appear from an affidavit filed in this court October 17, 1941, which is now a part of the record. Wick v. Chicago Telephone Co., 277 Ill. 338; Laskey v. Laskey, 226 Ill. App. 566. The affidavit was in support of a motion to dismiss the appeal. Plaintiffs filed counter-suggestions but no affidavit denying



Plaintiffs filed counter-suggestions but no affidavit denying. The affidavit was in support of a motion to dismiss the appeal. Telephone Co., 327 Ill. 338; Lasky v. Lasky, 326 Ill. App. 585. 17, 1941, which is now a part of the record. Wick v. Chicago are made to appear from an affidavit filed in this court October 16, 1941, to practically everybody in Oak Park. All these facts letter to the same effect was distributed under date of September 17, 1941, which is now a part of the record. Wick v. Chicago paper plaintiff corporation stated that an ordinance such as had September 18, 1941, by a paid advertisement in the local Oak Park different. The record in this case was filed August 4, 1941, in this suit and substituted for it another in substance quite enacted as an amendment in effect repealed the ordinance involved proper authorities of the Village of Oak Park by an ordinance dismissed July 17. Four days afterwards (on July 21, 1941) the have since the decision of the court become moot. The suit was since the record shows that, as a matter of fact, the questions It is unnecessary on this record to analyze the cases tone, 334; Kent v. City of Chicago, 301 Ill. App. 313, 314. Exchange v. McGlashen, 148 Ill. 375, 380, 381; High on Injunction, 334. Chicago Public Stock will use its extraordinary powers to interfere with officials The cases are rare indeed in which a court of equity the trial judge was sound in law. the ordinance by complaint in equity. We think the opinion of direct actions at law, while here the attempt was to challenge there the validity of the ordinance in question was tested in Mt. Vernon v. Julian, 323 Ill. 447 at 453, on the ground that distinguished Eden v. The People, 181 Ill. 286 at 303, and City of intervenes to prevent a multiplicity of suits. The court dis-

the truth of the statements recited. They attach to their counter-suggestions a letter on their stationery under date of October 8, 1941, addressed to "Dear Mr. and Mrs. Oak Parker", in which it is stated that plaintiffs have caused a survey to be made from which it appears that many retail establishments in Oak Park were violating the recently enacted ordinance. The letter adds: "In the meantime, Schlosser's Bakery at 1145 Lake Street, will continue to observe your wishes by remaining closed on Sundays".

This court will not spend its time in deciding whether the enforcement of an ordinance should be enjoined when it has been repealed and another substituted which plaintiffs have declared their intention to obey. In their counter-suggestions plaintiffs say the complaint also seeks relief against the enforcement of the State Sunday law. Ill. Rev. Stats., 1941, Chap.38, §262, par. 550, p. 1179. It is sufficient to say that on the authorities already cited the validity of that statute cannot be determined by complaint in equity. The order will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

the truth of the statements recited. They attach to their counter-suggestions a letter on their stationery and a date of October 8, 1941, addressed to "Dear Mr. and Mrs. Oak Parker", in which it is stated that plaintiffs have caused a survey to be made from which it appears that many retail establishments in Oak Park were violating the recently enacted ordinances. The letter adds: "In the meantime, Wolfson's Bakery at 1148 Lake Street, will continue to observe your wishes by remaining closed on Sundays".

This court will not spend its time in deciding whether the enforcement of an ordinance should be enjoined when it has been repealed and another substituted which plaintiffs have declared their intention to obey. In their counter-suggestions plaintiffs say the complaint also seeks relief against the enforcement of the State Sunday Law, Ill. Rev. Stats., 1941, Chap. 38, § 262, par. 1179. It is sufficient to say that on the authorities already cited the validity of that statute cannot be determined by complaint in equity. The order will be affirmed.

AFFIRMED.

McNulty, P. J., and O'Connor, J., concur.



41959

ANNA S. HOPSTEIN, )  
Appellee, )  
v. )  
JOSEPH HENTSCHEL, )  
Appellant. )

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

32  
24  
314 I.A. 387<sup>1</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree setting aside the release of a trust deed and granting foreclosure of it; also from an order affirming the master's report of sale and distribution and entering a judgment for deficiency against defendant in the sum of \$1,864.78, and appointing a receiver for the premises. The decree was entered March 3, 1941. The order approving the sale was made June 2, 1941. The premises are known as 2430 Eastwood Avenue in Chicago and are improved by a two-flat brick apartment building.

Defendant Hentschel took title to the premises June 2, 1925. He made a down-payment of \$5,000 on the purchase price of \$15,000. In her original complaint Mrs. Hopstein claimed the purchase was made by Hentschel as a joint adventure with her, and that she contributed \$1,000 toward meeting the purchase price. This defendant denies. The decree finds for the defendant on this issue on the theory that the Statute of Limitations has run against the claim, and plaintiff does not appeal from that part of the decree or argue cross-error.

The sole question between these parties concerns the note and trust deed executed by defendant June 9, 1928. The principal note was for \$5,000, made by defendant to his own order and by him endorsed. Attached were ten interest coupons for the sum of \$150 each, likewise executed and endorsed, representing interest to become due and payable on the principal promissory note until the maturity of it. The trust deed conveyed to Frank J. Lapin, Trustee.

ANNA S. HOPSTEIN,  
Appellee,  
v.  
JOSEPH HENTSCHEL,  
Appellant.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

314 T.A. 387

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree setting aside the release of a trust deed and granting foreclosure of it; also from an order affirming the master's report of sale and distribution and entering a judgment for deficiency against defendant in the sum of \$1,864.78, and appointing a receiver for the premises. The decree was entered March 8, 1941. The order approving the sale was made June 8, 1941. The premises are known as 2430 Eastwood Avenue in Chicago and are improved by a two-flat brick apartment building.

Defendant Hentschel took title to the premises June 8, 1935. He made a down-payment of \$5,000 on the purchase price of \$15,000. In her original complaint Mrs. Hopstein claimed the purchase was made by Hentschel as a joint adventure with her, and that she contributed \$1,000 toward meeting the purchase price. This defendant denies. The decree finds for the defendant on this issue on the theory that the Statute of Limitations has run against the claim, and plaintiff does not appeal from that part of the decree or argue cross-error.

The sole question between these parties concerns the note and trust deed executed by defendant June 9, 1938. The principal note was for \$5,000, made by defendant to his own order and by him endorsed. Attached were ten interest coupons for the sum of \$150 each, likewise executed and endorsed, representing interest to become due and payable on the principal promissory note until the maturity of it. The trust deed conveyed to Frank

Plaintiff testified that she went to the bank at the time of the execution of the note, got \$5,000 in cash and turned it over to defendant, and that defendant then gave her the trust deed and notes, told her he had made a will leaving all his property to her; that she gave the securities back to him on his promise he would place them in his safety deposit box to keep for her. Defendant does not deny he received \$5,000 from plaintiff at that time but says it was not her money but his own money which plaintiff had received before from him on her promise to take care of it for him. He says plaintiff kept this money in a "Mason jar" and a "blue pot", the first in the basement of the premises, the second in her room. The money, he says, was the proceeds of savings from his earnings from 1915 to 1937.

Special interrogatories were submitted to a jury of men and women. Their answers indicated they did not accept the "Mason jar" and "blue pot" theories as to the source of this money. Their replies indicated their opinion was plaintiff gave defendant \$1,000 when he purchased the premises, and that plaintiff did not return defendant's own money to him but on the contrary made him a loan of \$5,000 on June 9, 1928, from her own funds.

The relations of the parties become important. Defendant was born in Germany, came to the United States via Canada in 1913, when about twenty years of age. In New York he met plaintiff's husband, William Hopstein, and came with him to Chicago. Defendant was then and has remained a bachelor. He is now about forty-seven years of age. He boarded at the Hopstein home. He seems to have regarded it as his own. Several times the Hopsteins moved; he moved with them. Notwithstanding differences in age, defendant and plaintiff were attracted to each other. In her amended and supplemental complaint plaintiff describes their relations as "intimate" and of such a nature as to create



Plaintiff testified that she went to the bank at the time of the execution of the note, got \$5,000 in cash and turned it over to defendant, and that defendant then gave her the trust deed and notes, told her he had made a will leaving all his property to her; that she gave the securities back to him on his promise he would place them in his safety deposit box to keep for her. Defendant does not deny he received \$5,000 from plaintiff at that time but says it was not her money but his own money which plaintiff had received before from him on her promise to take care of it for him. He says plaintiff kept this money in a "Mason jar" and a "pine pot", the first in the basement of the premises, the second in her room. The money, he says, was the proceeds of savings from his earnings from 1915 to 1937. Special interrogatories were submitted to a jury of men and women. Their answers indicated they did not accept the "Mason jar" and "pine pot" theories as to the source of this money. Their replies indicated their opinion was plaintiff gave defendant \$1,000 when he purchased the premises, and that plaintiff did not return defendant's own money to him but on the contrary made him a loan of \$5,000 on June 2, 1928, from her own funds. The relations of the parties become important. Defendant was born in Germany, came to the United States via Canada in 1913, when about twenty years of age. In New York he met plaintiff's husband, William Hopstein, and came with him to Chicago. Defendant was then and has remained a bachelor. He is now about forty-seven years of age. He boarded at the Hopstein home. He seems to have regarded it as his own. Several times the Hopsteins moved; he moved with them. Notwithstanding differences in age, defendant and plaintiff were attracted to each other. In her amended and supplemental complaint plaintiff describes their relations as "intimate" and of such a nature as to create

a fiduciary obligation on the part of defendant. February 13, 1939, plaintiff made her Last Will and Testament. In it she gives all her household furniture to her husband. She recites that for fifteen years they have lived in a house belonging to defendant without rent paid or demanded. She says she feels there is an indebtedness to defendant of not less than \$40 per month for that period, and gives all the balance of her estate to him and appoints him executor, waiving bond. Plaintiff testified defendant promised he would make a like will in her favor. He denies this. She says defendant told her she should state in the will that she owed him some money, and that if she did not her relatives would be able to set the will aside. He denies this.

Defendant's testimony is that shortly after he went to live with the Hopsteins he began to drink heavily; that plaintiff urged him to stop drinking and save his money; that about 1915 he began turning over to her \$5.00 a week; that about 1918 he raised this to \$10.00 per week, and that he continued to turn over to plaintiff that amount each week up to 1937. He was an employee of Edwards & Deutsch, lithographers. Defendant testifies he did not wish the Hopsteins in his flat; that Mrs. Hopstein quarreled with his tenants and because of this he quarreled with her. They agree the first serious quarrel between them was in 1937, when Mrs. Emma Faith Multhaup (who came from California in part to testify in this case, and who from childhood was a friend of Mrs. Hopstein) having obtained a divorce from her husband with assistance from defendant, came to their home. Mrs. Hopstein learned that Joseph Hentschel was taking Mrs. Faith out and showing her other attentions. Mrs. Hopstein says she saw Emma Faith in the flat sitting on defendant's lap kissing him. She says, "I stopped them. I says, listen, if you want to do

a fiduciary obligation on the part of defendant. February 13, 1937, plaintiff made her last will and Testament. In it she gives all her household furniture to her husband. She recites that for fifteen years they have lived in a house belonging to defendant without rent paid or demanded. She says she feels there is an indebtedness to defendant of not less than 40 per month for that period, and gives all the balance of her estate to him and appoints him executor, waiving bond. Plaintiff testified defendant promised he would make a like will in her favor. He denies this. She says defendant told her she should state in the will that she owed him some money, and that if she did not her relatives would be able to set the will aside. He denies this.

Defendant's testimony is that shortly after he went to live with the Hopsteins he began to drink heavily; that plaintiff urged him to stop drinking and save his money; that about 1918 he began turning over to her \$5.00 a week; that about 1918 he raised this to \$10.00 per week, and that he continued to turn over to plaintiff that amount each week up to 1937. He was an employee of Edwards & Deutsch, lithographers. Defendant testifies he did not wish the Hopsteins in his flat; that Mrs. Hopstein quarreled with his tenants and because of this he quarreled with her. They agree the first serious quarrel between them was in 1937, when Mrs. Emma Faith Malthus (who came from California in part to testify in this case, and who from childhood was a friend of Mrs. Hopstein) having obtained a divorce from her husband with assistance from defendant, came to their home. Mrs. Hopstein learned that Joseph Hentschel was taking Mrs. Faith out and showing her other attractions. Mrs. Hopstein says she saw Emma Faith in the flat sitting on defendant's lap kissing him. She says, "I stopped them. I say, listen, if you want to do



that, go with her in a hotel, don't do it in front of my eyes." Mrs. Faith denies this. She says on oath that no man was ever given such privileges with her except her divorced husband. Defendant says Mrs. Hopstein threatened to shoot him, and that he called the police. He left the flat in which he had lived since he purchased it, and the home in which he dwelt from the time he came to America.

Plaintiff and defendant had been good friends up to this time. She had trouble with her eyes and consulted an eye specialist in Milwaukee. He went with her on trips to see the doctor. In 1930 they went to Germany on the same boat.

On October 3, 1939, defendant made a warranty deed conveying the premises to a Mr. and Mrs. Culberson. He then drove to California, where he met Mrs. Emma Faith Multhaup several times. By his direction the Culbersons made a demand on the Hopsteins to deliver possession of the second apartment at 2430 Eastwood Avenue by April 30, 1940, and shortly began a suit in forcible detainer in the Municipal Court to obtain possession. Defendant admits the forcible entry and detainer suit was by his direction. Plaintiff filed her complaint April 13, 1940, and on July 11, 1940, the Culbersons quitclaimed the premises back to defendant.

Defendant and Mrs. Faith gave testimony in support of the theory of the "Mason jar" and the "blue pot". The story had an element of romance. A young lady friend defendant knew in Germany failed to reply to his letters. He took to drink. Mrs. Hopstein sympathized with and rescued him. The uncontradicted written evidence in the case brands the "Mason jar" and "blue pot" story most improbable. Defendant admits that he had four bank accounts. Why should he choose to have his money left in a "blue pot" or a "Mason jar" under such circumstances? The pur-

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Defendant admits the forcible entry and detainer suit was by his direction. Plaintiff filed her complaint April 13, 1940, and on July 11, 1940, the Gulpersons disclaimed the premises back to defendant.

Defendant and Mrs. Faith gave testimony in support of the theory of the "Mason jar" and the "blue pot". The story had an element of romance. A young lady friend defendant knew in Germany failed to reply to his letters. He took to drink. Mrs. Hopstein sympathized with and rescued him. The uncontradicted written evidence in the case brands the "Mason jar" and "blue pot" story most improbable. Defendant admits that he had four bank accounts. Why should he choose to have his money left in a "blue pot" or a "Mason jar" under such circumstances? The pur-

chase price of the premises was \$15,000. He drew money from his bank account to make the first "down payment". Why go to the bank if the money was in the jar and the pot? Why continue to pay interest on encumbrances (as the evidence shows he did) when he had the money in the jar and in the pot, which was not drawing any interest? Why execute the notes and trust deed? The testimony of Mrs. Faith and defendant agree well in every detail but are improbable, considered in the light of all the evidence. The jury were not convinced; the chancellor was not; we are not.

The simple facts appear to be defendant, a youth, became infatuated with Mrs. Hopstein, who was twenty years his senior. She is now seventy years of age. With the coming into their home of the younger woman his affections were transferred. No flat was then big enough for these two. Defendant does not deny he received \$5,000 from Mrs. Hopstein at the time the note and trust deed were executed. When differences arose, having possession of the notes and trust deed, he had the notes marked paid and secured a release from the trustee, which he put of record. There is no controversy as to the amount due. The defendant argues the trustee was a necessary party, but this was not the case since the trustee conveyed back to him.

Twelve points are made in the brief with numerous citations of authorities. The law governing is well stated in Riehl v. Riehl, 247 Ill. 475, 477, 478. It would serve no useful purpose to analyze cases cited. The decree will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.



these price of the premises was \$1,000. He drew money from his bank account to make the first "down payment". Why go to the bank if the money was in the jar and the pot? Why continue to pay interest on encumbrances (as the evidence shows he did) when he had the money in the jar and in the pot, which was not drawing any interest? Why execute the notes and trust deed? The testimony of Mrs. Fitch and defendant agree well in every detail but are improbable, considered in the light of all the evidence. The jury were not convinced; the chancellor was not; we are not.

The simple facts appear to be defendant, a youth, became infatuated with Mrs. Hepstein, who was twenty years his senior. She is now seventy years of age. With the coming into their home of the younger woman his affections were transferred. No flat was then big enough for these two. Defendant does not deny he received \$5,000 from Mrs. Hepstein at the time the note and trust deed were executed. When differences arose, having possession of the notes and trust deed, he had the notes marked paid and secured a release from the trustee, which he put of record. There is no controversy as to the amount due. The defendant argues the trustee was a necessary party, but this was not the case since the trustee conveyed back to him.

Twelve points are made in the brief with numerous citations of authorities. The law governing is well stated in Rieth v. Rieth, 247 Ill. 475, 477, 478. It would serve no useful purpose to analyze cases cited. The decree will be affirmed.

AFFIRMED.

Mosely, P. J., and O'Connor, J., concur.

41925

JOSEPH WAGNER, doing business as  
WAGNER DAIRY PRODUCTS,  
Appellant,

v.

M. OKNER,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

33  
3141A.387<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a suit against defendant and obtained a preliminary injunction which, on appeal, was dissolved by this court, Wagner v. Okner, 306 Ill. App. 601. Afterward defendant filed suggestions for damages for the wrongful issuance of the injunction. The matter was referred to a master in chancery who took the evidence, made up his report and found that defendant was entitled to \$400 attorney's fees for his services in securing the dissolution of the injunction. The master's fees, and defendant's damages of \$1 were also included, making a total of \$543.30. It is to reverse this order or decree that plaintiff appeals.

The first pages of plaintiff's brief are taken up with the motion to strike from the transcript of the record what counsel designates as "the purported report of trial proceedings" had before the chancellor.

Rule 5 of this court provides that "All motions shall be in writing, supported by affidavit. They shall be filed with the clerk, together with three copies of the reasons and affidavits in support thereof, at least one day before they shall be called by the court. A copy of the motion, with reasons and affidavits, shall be served on counsel of the opposite party at least one day before they shall be filed with the clerk. All motions shall be entered by the clerk in a motion book, and on the day heretofore appointed by Rule 2 such motions will be called at the opening of court and determined or taken under advisement; notice of intention to file objections may be given to the court orally

JOSEPH WAGNER, doing business as  
WAGNER DAIRY PRODUCTS,  
Appellant,

vs.

v.

M. OKNER,  
Appellee.

SUPERIOR COURT,

COOK COUNTY,

388

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a writ against defendant and obtained a preliminary injunction which, on appeal, was dissolved by this court, Warner v. Okner, 308 Ill. App. 801. Afterward defendant filed suggestions for damages for the wrongful issuance of the injunction. The matter was referred to a master in chancery who took the evidence, made up his report and found that defendant was entitled to \$400 attorney's fees for his services in securing the dissolution of the injunction. The master's fees, and defendant's damages of \$1 were also included, making a total of \$401.30. It is to reverse this order or decree that plaintiff appeals.

The first pages of plaintiff's brief are taken up with the motion to strike from the transcript of the record what counsel designates as "the purported report of trial proceedings" had before the chancellor.

Rule 8 of this court provides that "All motions shall be in writing, supported by affidavit. They shall be filed with the clerk, together with three copies of the reasons and affidavits in support thereof, at least one day before they shall be called by the court. A copy of the motion, with reasons and affidavits, shall be served on counsel of the opposite party at least one day before they shall be filed with the clerk. All motions shall be entered by the clerk in a motion book, and on the day heretofore appointed by Rule 8 such motions will be called at the opening of court and determined or taken under advisement; notice of intention to file objections may be given to the court orally



when the motion is called. Objections thereto must also be in writing and three copies filed not later than the next day after the motion is called, and replies to objections will not be allowed and oral arguments on motions will not be heard. Motions shall not be presented in any other way or at any other time except in case of necessity." The provisions of the rule were not followed and the motion is not properly made for the first time in the brief filed by plaintiff. But in any event, there is no merit in the motion. We think the court followed the proper procedure in showing, by the record, what had taken place. The purpose of an appeal is to have any errors corrected that may have been committed by the trial court and obviously this cannot be done unless all that takes place is shown. Rule 1 of this court and Rule 36 of the Supreme court provide that "A brief statement by the trial judge of the reasons for his decision may be included in the report of the proceedings at the trial." This, in substance, is what appears from that part of the record complained of.

The record discloses that December 4, 1940, which was about two months after this court rendered its opinion reversing the injunctive order, defendant filed suggestions for damages, his counsel setting up in detail the services he rendered beginning June 6 and ending November 29, aggregating a total of 50 1/2 hours. December 14, defendant <sup>plaintiff</sup> filed his answer to the suggestions and on the same day <sup>defendant</sup> filed his answer to plaintiff's complaint. January 30, 1941, the matter on the suggestion of damages, was referred to a master to take the evidence and make up his report, together with his conclusions. The master made up his report, and supplemental report, to which plaintiff filed objections, they were overruled, and the report was filed in court April 24, 1941. The master recommended the allowance of \$400 solicitor's

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The record discloses that December 4, 1940, which was about two months after this court rendered its opinion reversing the injunctive order, defendant filed suggestions for damages, his counsel setting up in detail the services he rendered beginning June 6 and ending November 22, aggregating a total of 80 1/2 hours. December 14, defendant filed his answer to the suggestions and on the same day filed his answer to plaintiff's complaint. January 30, 1941, the matter on the suggestion of damages, was referred to a master to take the evidence and make up his report, together with his conclusions. The master made up his report, and supplemental report, to which plaintiff filed objections, they were overruled, and the report was filed in court April 24, 1941. The master recommended the allowance of \$400 solicitor's

fees and on the same date, April 24, 1941, an order was entered that all objections stand as exceptions and that further exceptions might be filed within 10 days by either party, and the matter was set for hearing May 19, 1941 on the contested motion calendar. April 30, plaintiff filed additional exceptions to the master's report and supplemental report. May 23, 1941, an order was entered which recites that the matter came on before the court on plaintiff's motion on his petition for a change of venue. He was given leave to file the petition instanter and the change of venue was denied.

The petition is in the conventional form and is sworn to by plaintiff May 22, 1941, and states the judge was prejudiced against him and such fact came to his knowledge May 20, 1941. June 6, 1941, the court entered an order allowing the damages as recommended by the master. June 25, plaintiff filed a notice of appeal and on the same day, an order was entered fixing the appeal bond at \$1,000. At the same time plaintiff filed his praecipe for record. June 27 a stipulation was entered into between the parties that the original master's report be incorporated in the transcript in lieu of a copy. On the same day an order was entered, upon motion of defendant, that the report of the proceedings on the hearing before the chancellor on plaintiff's petition for a change of venue, which was on that date filed, should be included in the record on appeal. Plaintiff objected to this order. On the same day the report of the proceedings was filed. It is certified by the trial judge and shows the proceedings beginning December 4, 1940, and the several days on which the matter was before the court thereafter. That on May 19, 1941, the matter was called, the court was advised that counsel for plaintiff was engaged and plaintiff requested a continuance. Thereupon counsel for defendant objected and requested



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the court to approve the master's report, and handed an order to the court to that effect. Thereupon the court told counsel representing plaintiff's counsel that he had considered the matter and found no basis for the exceptions to the master's report, but the representative requested a continuance until the next day, which was granted, and on the next day, May 20, the matter was again brought before the court when counsel for plaintiff was advised by the court what had taken place the previous day. Thereupon counsel requested another continuance so he could look up some cases.

At that time the record discloses that it was brought to the attention of all parties that the reference had been made January 30, 1941, and the master's report had been on file since April 24, 1941, and that the court had theretofore announced his decision and had granted a continuance until May 27, to afford an opportunity for counsel to look up some law. The next that appears is 3 days later, May 23, when the petition for change of venue was presented. We think the petition was presented too late. Eick v. Eick, 277 Ill. App. 329; In Re Wheeling Drainage District No. 1, 282 Ill. App. 565.

In the Eick case, in discussing the propriety of an order denying a petition for a change of venue we said: "The record discloses that the petition was presented after the close of all the evidence and after the chancellor had made his finding. It is obvious that the petition came too late. If it were permissible to file a petition for a change of venue after the evidence is all heard and the court has announced his decision, then there might never be a decision in any case because the party who was defeated could then present his petition for a change of venue. Obviously, this is not the law. The petition, not being presented in time, was properly denied."

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In the Wheeling case we said: "It has been repeatedly held that where a court has already commenced a hearing and has by his rulings indicated his views, it is too late for the party against whom such rulings have been made to move for a change of venue. \*\*\* It is the established rule that after a trial of a cause has commenced or is about to be commenced, it is too late to grant a petition for a change of venue. Hudson v. Hanson, 75 Ill. 198. In Richards v. Greene, 78 Ill. 525, it was said that to allow a change of venue after a trial has commenced or is about to be commenced would lead to endless delay, is not authorized by the statute and cannot be encouraged." The petition for a change of venue was properly denied. It was presented only for delay.

Plaintiff further contends that the \$400 allowed for solicitor's fees is excessive, and in support of this it is said that it appears from the record that defendant was his own attorney until after the case was reversed by this court. We think there is no merit in this contention. Defendant filed a special appearance in his own behalf but the evidence shows all the services were rendered by his counsel and the appearance was purported to have been prepared by the client for the sole purpose of saving a point which he thought might otherwise be waived.

Counsel for defendant, as a part of his suggestions for damages, attached an itemized statement as to the services rendered by him. The dates are set forth, the nature of the work done on each of the days, etc., and the number of hours necessarily employed was 50 1/2. On the hearing before the master defendant's counsel testified as to the services rendered by him and that the reasonable charge would be \$750. Other attorneys called by defendant testified, one that the services rendered were reasonably worth \$600, another \$750, another \$15 an hour or \$750. On the other side, counsel for plaintiff testified as

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to the time in court on the several occasions. Three other attorneys were called, one testified the services were reasonably worth \$75 on the basis that there was but \$100 involved in the case. We think this is a misconception of the amount involved. The other two testified, one that the services were reasonably worth from \$100 to \$125 and the other from \$90 to \$110.

We have considered the evidence on this phase of the case and are of opinion we would not be warranted in holding the amount allowed by the master, approved as it was by the chancellor, was so excessive as to require interference on our part.

The order and judgment of the Superior court of Cook county appealed from is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.



to the time in court on the several occasions. Three other attorneys were called, one testified the services were reasonably worth \$75 on the basis that there was but 100 involved in the case. We think this is a misconception of the amount involved. The other two testified, one that the services were reasonably worth from 100 to 125 and the other from \$90 to 110.

We have considered the evidence on this phase of the case and are of opinion we would not be warranted in holding the amount allowed by the master, approved as it was by the chancellor, was so excessive as to require interference on our part.

The order and judgment of the Superior Court of Cook

County appealed from is affirmed.

AFFIRMED.

McGuire, P. J., and Macchett, J., concur.

41936

VIRGINIA MARTIN, a minor by  
HENRY MARTIN, her father and  
next friend,

Appellee,

v.

CITY OF CHICAGO, a Municipal  
Corporation, and PUBLIX FUR-  
NITURE COMPANY, a Corporation,

CITY OF CHICAGO, a Municipal  
Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

388

314 I.A. ~~41936~~

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, by her father and next friend, brought an action against the City of Chicago and the Publix Furniture Company to recover damages for personal injuries claimed to have been sustained by her through the negligence of the City in failing to keep and maintain the sidewalk in front of the premises known as 306 East 31st street in a proper state of repair and defendant, in negligently allowing furniture, rugs and carpet to be upon the sidewalk in front of the premises. The case was called for trial February 25, 1941, and the report of the proceedings disclosed the counsel appearing for plaintiff and for the City, that no one represented defendant, Publix Furniture Company and what disposition, if any, was made in the case as to that defendant, so far as the record discloses is a mystery. During the trial, on motion of counsel for plaintiff, leave was given to amend by striking out the words, that Virginia Martin appeared by her next friend and that she should appear as plaintiff in the case. There was a verdict and judgment in plaintiff's favor for \$1,800 and the City appeals.

The record discloses that about 3 o'clock on Saturday afternoon, March 28, 1936, plaintiff, then about 14 years old, was roller skating with a girl friend on 31st street. The premises

4130

VIRGINIA MARLIN, a minor,  
DORIS MARLIN, her father and  
next friend,

v.

CITY OF CHICAGO, a municipal  
corporation, and ULLMAN  
FURNITURE COMPANY, a corporation,

CITY OF CHICAGO, a municipal  
corporation,  
Appellant.

1. The record discloses that during the year 1934,

plaintiff, a minor, by her father and next friend,

brought an action against the city of Chicago and the Ullman

Furniture Company to recover damages for personal injuries claimed

to have been sustained by her through the negligence of the city

in failing to keep and maintain the sidewalk in front of the premises

known as 212 West 1st Street in a proper state of repair and

defendant, in negligently allowing furniture, boxes and carpet to

be upon the sidewalk in front of the premises. The case was called

for trial February 22, 1934, and the report of the proceedings

disclosed the counsel appearing for plaintiff and for the city,

that no one represented defendant, Ullman Furniture Company and

what disposition, if any, was made in the case as to that defend-

ant, so far as the record discloses is a mystery. During the trial,

on motion of counsel for plaintiff, leave was given to amend by

striking out the words, that Virginia Marlin appeared by her next

friend and that she should appear as plaintiff in the case. There

was a verdict and judgment in plaintiff's favor for \$1,800 and the

City appeals.

The record discloses that about 2 o'clock on Saturday

afternoon, March 23, 1934, plaintiff, then about 14 years old,

was roller skating with a girl friend on 21st Street. The premises

4130

CHICAGO CITY

1934

388

314 I.A.



at 306 East 31st street was occupied by a furniture store, and the sidewalk was covered with a rug about 2 inches thick. There was furniture on the sidewalk near the curb and against the building on both sides of the rug. Plaintiff was skating east on the sidewalk and when she came to the rug she walked on it with her skates, stumbled and fell backward and was severely injured. She had passed the premises in question once or twice a week for about 2 years prior to the accident and had gone to a nearby store on her roller skates but did not notice any hole in the sidewalk. Her companion, who was ahead of her, crossed over the rug in safety.

Plaintiff called witnesses who testified there was a hole in the sidewalk in front of 306 East 31st street about 1 foot square and an inch and a half deep. Gwendolin Andrew, a young girl about 13 years of age at the time of the accident, was with plaintiff and testified they were on roller skates going to an A. & P. store nearby; that a rug was covering the sidewalk in front of 306 East 31st "and furniture and different things on both sides of the sidewalk." When they reached the rug they looked to see if they could cross it without falling; that plaintiff looked on both sides and tried to figure how she could go across; that she was about the middle of the rug when she fell.

On cross-examination counsel for defendant, after interrogating her as to some of the facts, submitted a photograph purporting to show the condition of the sidewalk in front of the building, for the purpose of identification, and exhibited the picture to counsel for plaintiff. After the witness had examined the photograph counsel for the City said: "would you say that picture portrays the condition of the sidewalk as it was on March 28, 1936?" This was objected to, the objection overruled and the witness answered in the affirmative - that the sidewalk was in the same condition on the day of the accident as shown by the photograph.

at 308 East 31st Street was occupied by a furniture store, and the sidewalk was covered with a rug about 2 inches thick. There was furniture on the sidewalk near the curb and against the building on both sides of the rug. Plaintiff was walking east on the sidewalk and when she came to the rug she walked on it for several feet, stumbled and fell backward and was seriously injured. She passed the premises in question once or twice a week for about 2 years prior to the accident and had come to a nearby store on that roller skates but did not notice any hole in the sidewalk. Her companion, who was ahead of her, crossed over the rug in safety. Plaintiff called witnesses who testified there was a hole in the sidewalk in front of 308 East 31st Street about 1 foot square and an iron and a ball deep. Defendant introduced a photograph 13 years of age at the time of the accident, was with Plaintiff and testified they were on roller skates going to an L. & S. store nearby; that a rug was covering the sidewalk in front of 308 East 31st and furniture and different things on both sides of the sidewalk. When they reached the rug they looked to see if they could cross it without falling; that Plaintiff looked on both sides and tried to figure how she could go across; that she was about the middle of the rug when she fell.

On cross-examination counsel for defendant, after interrogating her as to some of the facts, admitted a photograph purporting to show the condition of the sidewalk in front of the building, for the purpose of identification, and exhibited the picture to counsel for Plaintiff. After the witness had examined the photograph counsel for the city said: "Would you say that picture portrays the condition of the sidewalk as it was on March 23, 1936?" This was objected to, the objection overruled and the witness answered in the affirmative - that the sidewalk was in the same condition on the day of the accident as shown by the photograph.

Other witnesses, some of whom had seen the accident, were called on behalf of plaintiff and gave testimony, to the effect that there was a hole in the sidewalk. Irma Campbell testified she had seen the accident and had "noticed a defective condition in the sidewalk approximately six months before March 28, 1936. There were several cracked places in the sidewalk and at this particular point the sidewalk had caved in. It was approximately two feet long and about a foot and a quarter wide and sunk in about three inches." That when she observed this condition before the accident there was no rug on the sidewalk. Julia Andrew testified that she saw a hole in the sidewalk in 1935. "It was about a foot both ways. I just stumped my foot, it didn't seem to go down." It was about an inch or an inch and a half deep. Other witnesses gave substantially the same testimony.

At the close of plaintiff's case the City moved for a directed verdict which the court said he would "reserve." Thereupon counsel for the City offered the photograph of the sidewalk hereinbefore referred to, and over objection it was admitted. Defendant offered no further evidence and the case went to the jury with the result as above stated.

Plaintiff's theory of the case is that there was a hole in the sidewalk for a considerable period of time prior to the accident and that this condition was the result of the City's negligence. On the other side, defendant's theory of the case is that there was no hole in the sidewalk, that plaintiff was guilty of contributory negligence and that a rug was placed on the sidewalk by a third person, which constituted an intervening cause, which was the proximate cause of the accident, and that the verdict and judgment is against the manifest weight of the evidence. We are not interested as to whether there was an intervening cause. The only question of importance in the case is whether there was a hole in the sidewalk or



Other witnesses, some of whom had seen the accident, were called on behalf of Plaintiff and gave testimony, to the effect that there was a hole in the sidewalk. These witnesses testified that they had seen the accident and had noticed a defective condition in the sidewalk approximately six months before March 20, 1935. There were several cracked places in the sidewalk and at this particular point the sidewalk had moved in. It was approximately two feet long and about a foot and a quarter wide and sunk in about a two inches. That when she observed this condition before the accident there was no rug on the sidewalk. This in turn testified that she saw a hole in the sidewalk in 1935. "It was about a foot both ways. I just stumbled my foot, it didn't seem to hurt." It was about an inch or an inch and a half deep. Other witnesses gave substantially the same testimony.

At the close of Plaintiff's case the City moved for a directed verdict which the court said it would reserve. Thereupon counsel for the City offered the photograph of the sidewalk hereinbefore referred to, and over objection it was admitted. Defendant offered no further evidence and the case went to the jury in the result as above stated.

Plaintiff's theory of the case is that there was a hole in the sidewalk for a considerable period of time prior to the accident and that this condition was the result of the City's negligence. On the other side, Defendant's theory of the case is that there was no hole in the sidewalk, that Plaintiff was guilty of contributory negligence and that a rug was placed on the sidewalk by a third person, which constituted an intervening cause, which was the proximate cause of the accident, and that the verdict and judgment is against the Plaintiff on the evidence. We are not interested as to whether there was an intervening cause. The only question of importance in the case is whether there was a hole in the sidewalk or

whether it was in a bad state of repair. As stated, a number of witnesses testified there was a hole in the sidewalk. But from the photograph in evidence which the witness, Gwendolin Andrew, who was with plaintiff at the time testified portrayed a true condition of the sidewalk as it was March 28, 1936, it is clear there was no hole in the sidewalk and the finding of the jury in plaintiff's favor is against the manifest weight of the evidence.

The judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

whether it was in a bad state of repair. As stated, a number of  
witnesses testified that there was a hole in the sidewalk, but from  
the photographs in evidence taken from various angles, and  
who are with plaintiff as the time the photograph was taken, the con-  
dition of the sidewalk as it was shown in 1935, it is clear that  
there was no hole in the sidewalk and the finding of the jury in favor  
of the defendant is against the weight of the evidence.  
The judgment of the Circuit Court of Cook County is re-  
versed and the case remanded.

WITNESSES AND COUNSEL

Respectfully,  
J. J. and Associates, P.C.



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

October Term, A. D. 1941

Agenda 22

Term No. <sup>4022</sup> ~~22~~

NAKO RISTO,

Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF  
MADISON,

Defendant-Appellee.

Appeal from the

Circuit Court of

Madison County.

314 I.A. 403

STONE, P. J.

This appeal is from a judgment of the Circuit Court of Madison County against plaintiff for costs and in favor of defendant. Said suit was brought by plaintiff on a time certificate of deposit issued by defendant to plaintiff on July 13, 1924. The amount of this certificate of deposit afterwards took the form of a draft on the Chemical National Bank of New York, payable to plaintiff. The draft was delivered by defendant to plaintiff's agent who took it to New York, forged the name of plaintiff thereon and obtained the amount of the funds. Plaintiff was a Greek who had lived in this country about fifteen years, residing near Madison, Illinois. While there he acquired some money and had about three thousand dollars on deposit in defendant, which was evidenced by a time certificate payable 12 months after date with four percent. interest. Plaintiff had done his banking business with defendant for some years. In 1920 he had some twenty-six hundred dollars on deposit with defendant under a time certificate payable 12 months after date with interest at four percent. On July 13, 1931, plaintiff endorsed this certificate to defendant, and in exchange therefor, together with \$295.97 in cash, received another time certificate for the sum of \$3,000. This certificate was identical with the one issued the previous year and was issued under the same conditions and at the same rate of interest.



In September, 1921, plaintiff informed defendant that he was leaving for Greece and that he was leaving his certificate, the one just described, with C. P. Veschuroff, a merchant at Madison who was known to defendant, for the purpose of surrendering it when due in exchange for a new certificate of like tenor and effect, and that this process would be repeated from year to year. It was so repeated. From year to year Veschuroff turned in the certificate which was mature, added the interest thereon, and received a new certificate of the same tenor for the new amount. When the last certificate, No. 7896, came due in July Veschuroff instead of surrendering it to the bank in exchange for a new certificate of like tenor, without the knowledge or consent of the plaintiff as far as this record shows, requested the defendant to issue a New York draft for the entire amount of the deposit and accrued interest. This the bank did, drawing said draft on the Chemical National Bank of New York, City. The exact amount of the draft was \$3,509.57. This draft was made payable to plaintiff. The bank thereupon took the matured certificate of deposit, No. 7896, stamped it paid, and filed it among its cancelled certificates. It then charged the amount of the draft against plaintiff's deposit and accrued interest on its books.

In June, 1925, plaintiff wrote to Veschuroff to send him \$50.00 of the interest which would accrue on the certificate when it matured on July 13. Veschuroff sent plaintiff the \$50.00, but he did not tell him that he had surrendered the certificate for a draft, had forged plaintiff's name on the back of the draft, deposited the sum to his own credit in his own bank, and appropriated the proceeds thereof to his own use. This character of conduct was continued from time to time for a period of some five years, which appears from the record to be a complete deception of plaintiff by Veschuroff. In 1930, plaintiff requested Veschuroff to send him the certificate, and Veschuroff for the first time informed plaintiff of what he had done. He did not, however, tell him how and when it had been done, and plaintiff was not fully advised about the facts





until the year 1932. Much time was put in by plaintiff in trying to discover the exact condition of his account with defendant. The correspondence proved unsatisfactory. Counsel was afterwards retained, and after making demand upon defendant for the amount in question, and that being unavailing, plaintiff's counsel brought suit in his name for the amount.

When Veschuroff received from the defendant bank, on July 23, 1925, the draft for \$3,509.57 on the Chemical National Bank of New York, he forged plaintiff's name on the back of it, spelling his first name "Naco" instead of "Nako", as plaintiff spells it. He then stamped upon it an endorsement "Pay to Irving Bank - Columbia Trust Co., New York, or order, all prior endorsements guaranteed, C. P. Veschuroff & Son," and deposited it to the credit of his checking account in Irving Bank - Columbia Trust Co., New York, which collected it from the drawee bank through the New York Clearing House on July 27, 1925. The cancelled draft was then returned to the defendant bank, and by it filed away among its records.

At the time of rendering judgment the trial court expressly found that the endorsement of plaintiff's name on the back of the draft was a forgery. Defendant introduced evidence that it had searched for and could not find the signature card of plaintiff, and that it had searched for and could not find written authority from the plaintiff to issue a draft for the amount of the certificate of deposit. Veschuroff testified, or attempted to testify, that he had received a letter from plaintiff authorizing him to cash the certificate. This evidence was properly excluded by the Court.

The assignments of error are that the Court erred in finding the issues for the defendant and in not entering judgment for the plaintiff, and so forth.

Two questions are presented by this record: first, was the defendant legally justified in issuing the draft for the certificate of deposit and delivering same to Veschuroff? Appellee contends that it was, by reason of the apparent agency of Veschuroff of plaintiff. There is no proof of actual agency to do this particular act, but there is proof of the agency of Veschuroff to exchange the deposit





certificates as he had done.

The second question is: This draft having been paid on a forged endorsement of plaintiff's name, did such act establish liability against defendant?

Appellee seriously contends that the circumstances of the dealings between it and Veschuroff together with his standing in the community, fully warranted defendant in delivering the draft to Veschuroff as it did; that is that Veschuroff had apparent authority to do what he did, that his agency in this respect was an apparent agency, in addition to such express agency as they had acted on in the former transactions. Appellant with equal vehemence denies that justification.

There are cases in Illinois which approve of the theory of lawfully acting on apparent agency; but not one of these cases is precise authority for this case or any other case of a similar character. In each instance, the right to act upon apparent agency must be governed by the facts and circumstances of that particular case. Under the evidence in this case we cannot agree that Veschuroff had such apparent authority as to justify defendant's action. But we do not regard that question as the controlling question in this case. If we assume, for the sake of argument, that defendant was warranted in delivering the draft in question to Veschuroff under the circumstances of such delivery, we still are constrained to hold both under law and under logic, as we view it, that the delivery of this draft without the knowledge or consent of plaintiff did not pay the debt which defendant owed to plaintiff by reason of plaintiff's deposit in defendant.

Cases are numerous in Illinois which hold that the mere deposit of a check in the usual course of business is for collection only and not as money; and where a creditor endorses and deposits a check tendered by a debtor in satisfaction of a claim, the acceptance is on condition that the check will be paid in due course. Smith, Admr. vs. Bond, 311 Ill. 311. To the same effect is First National Bank of Chicago vs. Pease, 68 Ill. 40. It must necessarily



be so, else the issuing of checks and drafts in payment of debts would open the gateway to the grossest fraud to an incalculable extent. It is almost universally held that the payment of a check on a forged endorsement makes the bank which pays said check liable to the proper payee. In the case of a draft it is not payment of a debt until it is accepted by the drawee. In State Bank of Chicago, vs. Mid-City Trust & Savings Bank, 295 Ill. 21, it is held "If the drawee bank has accepted a check at the request of payee it is liable to payee, but if the acceptance is not at the request of payee, it is of no effect as to him, and the liability of the bank to the drawer is not affected by it." In Vanetta vs. Lindley, 198 Ill. 40, it is held that a "forged endorsement is void, even in the hands of an innocent purchaser for value without notice."

It seems perfectly logical to us, even in the absence of authority that a bank cannot extinguish its depositor's account by issuing its draft and passing it on to a stranger. Many things might happen which would unquestionably render the account of payee just as it was before the draft was drawn. Suppose the payee should lose the draft and make proper proof of that, could it be said that the act of writing the draft closed the account and paid the depositor in full, the bank having been out no money? Suppose a fire should extinguish the draft in the hands of the payee, along with his other chattels, would the bank which issued that draft not still be indebted to the payee? Suppose the draft were stolen from the payee and proof of that fact was made, would it not be the duty of the drawer to make proper notice and upon that being established, wouldn't the account of the payee in the draft be the same with the drawer as it had always been? In this case the draft was worse than stolen, and there is the additional circumstance that it never came into the hands of the payee and never came to his knowledge until years after, that the draft had been issued in his name, or in fact had been issued at all. So it must follow that there is some point which marks distinctly the point at which the





draft is paid and the drawer thereof is relieved of liability. That point under the law is when such draft is accepted and paid by the drawee. But this means a lawful acceptance and a lawful payment, not the acceptance of a void instrument and payment thereon. The drawee cannot give life by a pretended acceptance and payment thereof to an instrument that is utterly void as the draft in this case was when it was presented with the payee's name forged thereon.

In addition to the cases cited, these propositions have been held and elucidated very clearly in some of the other jurisdictions whose Negotiable Instrument Act is identical with our own. Szevento Juozupo vs. Manhattan Savings Institution, 178 Appellate Division, New York, 57; Tappler vs. Boston Penny Savings Bank, 2nd Northeastern, 2nd Ed. 198 (Mass.). These cases collect many citations through different jurisdictions, and in each of them the facts in the case are such as to render the case authority in the case at bar.

In the instant case the drawee bank did an unlawful act; it cannot profit by that. The payee whose name was forged cannot suffer by it; the conditions exist as they existed originally; the drawee bank had no right to charge the amount of the draft against defendant's account with it. Therefore, defendant still had its account intact, and, therefore, still held the money of plaintiff. If these facts are not literally true, the legal machinery is at hand to bring about exactly that situation.

Another fact which would seem to place an additional burden upon defendant in this case is that it must have known that when it even issued the draft, it was doing so under questionable right to say the least, and when the draft came back to it within seven days it knew for two reasons that the name of the payee had been forged thereon. First, because the payee lived in Greece and the draft could not possibly have gotten there and been endorsed by him and returned to New York and back to them within seven days. In those days the commercial plane and the mail plane had not





arrived at their present state of efficiency. Secondly, they were familiar with plaintiff's signature, or in the exercise of reasonable care in that behalf would have been acquainted with it, and they were charged with the duty of seeing whether that draft was endorsed by the proper payee. Had they done this they could have and would, in the course of honest and intelligent banking, immediately have notified the drawee bank of such forgery and held it responsible for its wrongful act, instead of apparently assisting it as it did.

For the above reasons, together with the above authorities, we are of the opinion that at the time of the bringing of this suit, the status of debtor and creditor existed between plaintiff and defendant, and that plaintiff had a right to recover the full amount of his claim.

The case is reversed and remanded to the trial court with instructions to that court to award judgment to plaintiff for the full amount of his claim together with legal interest thereon, to be computed under the direction of said court.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract

FILED

MAR 31 1910

*David J. Mallett*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



41972

314 I.A. 404

CITY OF CHICAGO,  
Appellee,

v.

LESTER SIMON IMP. MILTON H. CALLNER,  
Appellants,

) APPEAL FROM

) MUNICIPAL COURT,

) OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a finding of guilty of violating a city ordinance entered February 5, 1941. A fine of \$200 was assessed with judgment therefor and for costs. The judgment order recites: "The Court finds that it has jurisdiction of subject matter and parties hereto, and that 'defendant' has been convicted of violation of ordinance according to law and that 'any person' so convicted may be imprisoned in House of Correction for non-payment of fine".

There was a motion (by whom the record does not state) to vacate the judgment which was continued from time to time and finally denied. June 4, 1941, Milton Callner by leave appeared specially and filed a written motion to vacate the judgment. The same day Lester Simon made a written motion to vacate. July 3, 1941, the trial judge entered an order overruling motion of "defendant" heretofore entered herein to vacate judgment. There was also a motion in arrest of judgment, by whom the record does not state. This was denied July 9, 1941, and the record states a "warrant ordered". The record shows a motion (by whom is not stated) to stay the warrant. On July 15, notice of a joint and several appeal by Lester Simon and Milton H. Callner was filed.

By a special plea Callner raised the question of whether the court had jurisdiction of him. The complaint was filed August 1, 1940. The complaint did not name Callner as defendant. No process issued against or was served on him. On the face of the complaint after the address of Lester Simon appears the words,



3141.A.404

41272

CITY OF CHICAGO  
Appellee,

APPEAL FROM  
MUNICIPAL COURT,  
OF CHICAGO.

LESTER SIMON IMP. MILTON H. GALLNER,  
Appellants.

MR. JUSTICE MATHOMATT DELIVERED THE OPINION OF THE COURT.

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the court had jurisdiction of him. The complaint was filed August 1, 1940. The complaint did not name Gallner as defendant. No process issued against or was served on him. On the face of the complaint after the address of Lester Simon appears the words,

(written by an unknown person with lead pencil) "Imp. Milton Gallner". There is no order making Gallner a defendant. The complaint says Inspector Murphy was sworn and on information and belief says that Lester Simon on May 16, 1940, violated the ordinance in that he "on said day owned, maintained or controlled premises at 1250-58 S. Halsted St., Chicago, in an unsafe manner by failing to remove awning which obstructs fire escape at 1st floor". The complaint continues: "Also by failing to install an approved system of automatic sprinklers in premises throughout basement".

The complaint recites that it is subscribed and sworn to before the Clerk of the court October 15, 1940, which is about 75 days after it was filed. It is not "subscribed" by "Inspector Murphy" or by anybody else. The record recites that on August 7, 1940, Inspector Murphy presented the complaint under oath and moved for leave to file it; that the judge examined the complaint and examined under oath the person presenting it, and was satisfied there was probable cause, and that leave was given to file it. The record also recites that it was ordered "defendant" be held to bail and be permitted to deposit \$50 cash in lieu of bond. The order also recites that it appearing to the court "that 'defendant' herein was arrested without warrant, capias or other writ and is now here present in open court, court takes jurisdiction of person of said 'defendant' and bailiff is ordered to take body of said 'defendant' into custody."

The next proceeding shown in the record is under date of February 5, 1941, when the record states said "defendant" was advised of his right of trial by jury and elected to waive it; that this cause is by agreement in open court between the parties hereto submitted to the court for trial; that the court heard evidence and argument of counsel and finds "the defendant" guilty, assesses a fine "against said defendant".

(written by an unknown person with lead pencil) "Imp. Milton  
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evidence and argument of counsel and finds "the defendant" guilty,  
assesses a fine "against said defendant".



Except in the complaint the record does not once name Lester Simon, and not once does it name Milton Callner except in the complaint as "Imp. Milton Callner". The record is unique and unusual in that neither from the finding, the judgment nor the pleadings is it possible to tell with certainty who the judgment is against or whether it was the intention of the court to find one or both persons named in the complaint guilty of the violation of the ordinance.

In the first place, we think it is clear the court had no jurisdiction over Milton H. Callner. No order was entered making him a party to the proceeding. No complaint was filed which named him as a violator of the ordinance. This was a case of the fifth class in the Municipal Court. (Ill. Rev. Stats., 1941, Chap. 37, §2, p. 1044.) The City says that under Section 49 of the Municipal Court Act, which describes the practice in cases of the fifth class, it was unnecessary to file any statement of claim. Section 19 of the Act in part provides:

"The issues shall be determined without other forms of written pleadings than those hereinafter expressly prescribed or provided for."

The fair construction of this section is that the forms of written pleadings provided in the statute or rules shall be followed. Section 40 of the Municipal Court Act provides that the court may make all rules necessary to the determination of fourth class cases, and Section 49 of the Act provides that the practice in cases of the fifth class shall be as near as may be the same as therein prescribed for civil cases of the fourth class. That the court has provided for written pleadings in such cases, see Rule 21 and Rule 20 (4) of the Municipal Court. Rule 21 expressly provides that "new parties may be added \* \* \* by order of the court, at any stage of the cause, \* \* \*." To the same effect are Sections 25 and 26 of the Civil Practice Act, and that such has been the holding of this court, see Grewenig v.

Except in the complaint the record does not once name Lester Bimon, and not once does it name Milton Galiner except in the complaint as "Imp. Milton Galiner". The record is unique and unusual in that neither from the finding, the judgment nor the pleadings is it possible to tell with certainty who the judgment is against or whether it was the intention of the court to find one or both persons named in the complaint guilty of the violation of the ordinance.

In the first place, we think it is clear the court had no jurisdiction over Milton H. Galiner. No order was entered making him a party to the proceeding. No complaint was filed which named him as a violator of the ordinance. This was a case of the fifth class in the Municipal Court. (Ill. Rev. Stat., 1941, Chap. 37, §2, p. 1044.) The City says that under Section 49 of the Municipal Court Act, which describes the practice in cases of the fifth class, it was unnecessary to file any statement of claim. Section 49 of the Act in part provides:

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American Baking Co., 293 Ill. App. 604, 609. In that case we said: "The mode generally prescribed for bringing in new parties, after the court has made an order to such effect, appears to be by amending the complaint by adding the new parties together with such other amendments with respect to the allegations thereof as are necessary, and unless such new parties defendant enter an appearance to serve them with summons in the manner prescribed by statute."

It clearly follows that since no complaint or statement of claim was filed against Milton H. Callner, and since he was neither served with summons nor entered an appearance, the court was wholly without jurisdiction to pronounce judgment against him.

In the second place, it is contended in behalf of Lester Simon that the judgment is so uncertain in so far as he is concerned that it must be regarded as void. In 33 Corpus Juris 1197, it is stated: "A judgment must designate the parties for and against whom it is rendered, or it will be void for uncertainty."

This seems to state a general and elementary doctrine. In Niemeyer v. Berg, 186 Ill. App. 107, 108, which was a fourth class action in tort in the Municipal Court, there was a finding that the "defendant" was guilty in the manner and form as charged in plaintiff's statement of claim. Damages were assessed and judgment entered. On appeal we held that a judgment on such a finding could not be sustained because it was uncertain which one of the defendants was found guilty and against which one the judgment was rendered.

In O'Connor v. Mullen, 11 Ill. 116, 118, in an action for debt where there were two defendants, where one defendant alone was served and judgment entered by default against "defend-



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In O'Connor v. Miller, 11 Ill. 116, 118, in an action for debt where there were two defendants, where one defendant alone was served and judgment entered by default against "defend-

ants" with final judgment that plaintiff recover from "defendant", the Supreme Court said it was error to enter a judgment by default against both defendants when only one had been served with process, and that a final judgment although against but one defendant, left it uncertain as to which defendant.

For the reasons indicated the judgment of February 5, 1941, and the order entered July 3, 1941, overruling motions of Simon and Callner to vacate the judgment, and that portion of the order entered July 9, 1941 denying the motion in arrest of judgment, will be reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

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For the reasons indicated the judgment of February 5, 1941, and the order entered July 3, 1941, overruling motions of Simon and Gallner to vacate the judgment, and that portion of the order entered July 3, 1941 denying the motion in arrest of judgment, will be reversed.

REVERSED.

McGregory, P. J., and O'Connor, J., concur.



41488

DOWNNEY COAL COMPANY,  
a corporation,  
Appellant,

v.

THE LIVE STOCK NATIONAL BANK OF  
CHICAGO, a corporation, as  
Trustee under Trust No. 10893  
known as 75th & Colfax Building  
Liquidation Trust, A. EPSTEIN,  
HARRY S. SCHRAM and WILLIAM A.  
ROGAN, Trust Managers,  
Appellees.

41  
APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

314 I.A. 566

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The trial court sustained a motion of defendants The Live Stock National Bank of Chicago, as Trustee, A. Epstein, and Harry S. Schram, as Trust Manager, to strike and dismiss the second amended complaint of plaintiff on the ground that it states no cause of action, and entered an order dismissing said complaint for want of equity. Plaintiff appeals. Defendant William A. Rogan, one of the Trust Managers, has not filed a brief in this court.

The verified second amended complaint alleges the following: That prior to February 15, 1928, Thomas H. Cochran and Fred E. Downey were the owners in fee simple of certain real estate located at the southwest corner of 75th street and Colfax avenue, Chicago, subject to a first mortgage to the Central Manufacturing District Bank of Chicago to secure \$200,000 of bonds; that Downey was president and a stockholder of plaintiff company; that by June 18, 1935, the principal of the mortgage was reduced to \$182,000; that prior to August, 1932, the said bank was taken over by the Auditor of Public Accounts and that a Bondholders' Committee was formed, consisting of A. Epstein, Chairman, and others; that Epstein, on March 21, 1933, filed a complaint in the Superior court of Cook county to foreclose the mortgage; that the Committee and Epstein then represented \$15,000 of the

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was president and a stockholder of plaintiff company; that by  
District Bank of Chicago to secure \$200,000 of bonds; that Downey  
Chicago, subject to a first mortgage to the Central Manufacturing  
located at the southwest corner of 75th street and Golfax avenue,  
E. Downey were the owners in fee simple of certain real estate  
ing: That prior to February 12, 1928, Thomas H. Cochran and Fred  
The verified second amended complaint alleges the follow-  
court.

Rogan, one of the Trust Managers, has not filed a brief in this  
for want of equity. Plaintiff prays, Defendant William A.  
cause of action, and entered an order dismissing said complaint  
amended complaint of plaintiff on the ground that it states no  
E. Schram, as Trust Manager, to strike and dismiss the second  
Stock National Bank of Chicago, as Trustee, A. Epstein, and Harry  
The trial court sustained a motion of defendants The Live  
BY, PRESIDING JUSTICE SEAGAN DELIVERED THE OPINION OF THE COURT.

314 I.A. 566

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY

THE LIVE STOCK NATIONAL BANK OF  
CHICAGO, a corporation, as  
Trustee under Trust No. 10893  
known as 75th & Golfax Building  
Liquidation Trust, A. Epstein,  
HARRY S. SCHRAM and WILLIAM A.  
ROGAN, Trust Managers,  
Appellees.

Appellant  
v.  
Appellees

41488

bonds, but that under the terms of the mortgage a minimum of twenty per cent, or \$37,000, of bonds was necessary to institute proper foreclosure proceedings; that the owners of the equity and the Committee had been negotiating upon a plan of reorganization; that as a result of the negotiations the Committee and the owners, on March 22, 1933, entered into the agreement attached to the complaint as Exhibit "A"; that this agreement, in short, provided that the owners shall convey the title to the real estate to the Committee, subject only to the first mortgage; that the Committee agreed to immediately put on a drive and "get all of the said bonds deposited with your Committee;" that when all the bonds were deposited the property was to be conveyed to The Live Stock National Bank of Chicago in a liquidating trust, in which the owners and the bondholders were to share, the owners receiving approximately nine per cent; that in the event of failure to get all the bonds deposited, the Committee was permitted to reconvey the real estate to the owners, or prosecute and complete a foreclosure without any deficiency judgment; that in the event the property was conveyed to the liquidating trust all liability of the owners on the bonds and coupons was to be cancelled; that William A. Rogan, attorney for the owners, and George F. Anderson, attorney for the Committee, should agree upon the terms of the liquidating trust in the event it should be considered advisable to deviate from the regular form; that this agreement was signed by the owners of the equity and the Committee; that the time limitation imposed by the agreement was extended indefinitely by the later agreement of March 30, 1935, signed by the same parties, and which is attached to the complaint as Exhibit "C"; that on March 22, 1933, the owners conveyed to a nominee of the Committee, and the Committee thereafter solicited the deposit of bonds; that from March 22, 1933, to February 23, 1935, the



of bonds, but that under the terms of the mortgage a minimum of twenty per cent or \$7,000 of bonds was necessary to institute proper foreclosure proceedings; that the owners of the equity and the Committee had been negotiating upon a plan of reorganization; that as a result of the negotiations the Committee and the owners, on March 22, 1933, entered into the agreement attached to the complaint as Exhibit "A"; that this agreement, in short, provided that the owners shall convey the title to the real estate to the Committee, subject only to the first mortgage; that the Committee agreed to immediately put on a drive and "get all of the said bonds deposited with your Committee"; that when all the bonds were deposited the property was to be conveyed to The Five Stock National Bank of Chicago in a liquidating trust, in which the owners and the bondholders were to share, the owners receiving approximately nine per cent; that in the event of failure to get all the bonds deposited, the Committee was permitted to reconvey the real estate to the owners, or prosecute and complete a foreclosure without any delinquency judgment; that in the event the property was conveyed to the liquidating trust all liability of the owners on the bonds and coupons was to be cancelled; that William A. Hogan, attorney for the owners, and George F. Anderson, attorney for the Committee, should agree upon the terms of the liquidating trust in the event it should be considered advisable to deviate from the regular form; that this agreement was signed by the owners of the equity and the Committee; that the time limitation imposed by the agreement was extended indefinitely by the later agreement of March 30, 1933, signed by the same parties, and which is attached to the complaint as Exhibit "B"; that on March 22, 1933, the owners conveyed to a nominee of the Committee, and the Committee thereafter solicited the deposit of bonds; that from March 22, 1933, to February 23, 1935, the

Committee represented to the owners that it would soon obtain a deposit of all outstanding bonds, and it would likewise take all proper safeguards and protect them against any possible deficiency or liability on the outstanding bonds in the event it was not able to secure a one hundred per cent deposit; that on March 30, 1935, at the time of the waiver of the time limit, the Committee represented that if the foreclosure was completed and a sale held it was of the opinion that the entire issue of bonds would be deposited, and that in the event that the entire issue was not deposited, the non-depositing bondholders would be protected by subsequent provision in the Liquidation Trust Agreement; that the property was sold on April 11, 1935, for \$41,000, which was approximately twenty cents on the dollar, to the nominee of the Committee; that an immediate redemption was made and title obtained by the Committee; that on May 7, 1935, the said sale was approved without notice to any non-depositing bondholder, but in the order approving the sale the Committee had inserted a provision that bondholders might deposit their bonds with the Committee within ninety days; that at the time of the sale John G. Oglesby owned the bonds now held by plaintiff; that Oglesby was given no notice of the entry of the order of May 7, 1935, and the court obtained no jurisdiction of him or any other bondholder, and, in fact, the Plan of Reorganization was never submitted to the court; that on May 9, 1935, the Committee conveyed the title to The Live Stock National Bank as Trustee and had it issue its printed trust agreement on said date; that the printed Trust Agreement provided for the management of the real estate by three Trust Managers, A. Epstein, Harry S. Schram and William A. Rogan; that the said Agreement did not fully embrace all of the agreements of the parties and was not so intended, so a supplemental agreement of June 13, 1935, was made, which was signed by the Trust Managers and O.K.'d by the owners of the equity of



Committee represented to the owners that it would soon obtain a deposit of all outstanding bonds, and it would likewise take all proper safeguards and protect them against any possible delinquency or liability on the outstanding bonds in the event it was not able to secure a one hundred per cent deposit; that on March 30, 1935, at the time of the waiver of the time limit, the Committee represented that if the foreclosure was completed and a sale held it was of the opinion that the entire issue of bonds would be deposited, and that in the event that the entire issue was not deposited, the non-depositing bondholders would be protected by subsequent provision in the Liquidation Trust Agreement; that the property was sold on April 11, 1935, for \$41,000, which was approximately twenty cents on the dollar, to the nominee of the Committee; that an immediate redemption was made and title obtained by the Committee; that on May 7, 1935, the said sale was approved without notice to any non-depositing bondholder, but in the order approving the sale the Committee had inserted a provision that bondholders might deposit their bonds with the Committee within ninety days; that at the time of the sale John G. Oglesby owned the bonds now held by plaintiff; that Oglesby was given no notice of the entry of the order of May 7, 1935, and the court obtained no jurisdiction of him or any other bondholder, and, in fact, the Plan of Reorganization was never submitted to the court; that on May 9, 1935, the Committee conveyed the title to The Live Stock National Bank as Trustee and had it issue its printed trust agreement on said date; that the printed Trust Agreement provided for the management of the real estate by three Trust Managers, A. Epstein, Harry S. Schram and William A. Rogan; that the said Agreement did not fully embrace all of the agreements of the parties and was not so intended, so a supplemental agreement of June 13, 1935, was made, which was signed by the Trust Managers and O.K.'d by the owners of the equity of



redemption; that this amendment to the Liquidation Trust provided for the payment of certain expenses of reorganization and distribution of income, the placing of the management of the property with the Realty Renting Agency, and constituted the Realty Renting Agency as the representative of the Trust Managers and for the placing of insurance and active management of the property; and further for a certificate of beneficial interest for 448 units to be issued to The Live Stock National Bank of Chicago, as Trustee, representing \$22,400 of undeposited bonds; that specific non-depositing bondholders were mentioned by name, and the agreement continued: "If and when any of the said bonds are subsequently deposited, the Trustee shall issue a certificate of beneficial interest for a corresponding number of units to the bondholder making the deposit and reduce the above mentioned certificate issued to the Trustee by an equal number of units. In the event that any of the bonds are surrendered to the Live Stock National Bank by the holders thereof, for their pro rata share in the foreclosure sale price which has been deposited with The Live Stock National Bank, the Trustee shall cancel a corresponding number of units in the above mentioned certificate for 448 units issued to the Trustee and reduce the trust by a like number of units;" that this supplemental agreement constitutes a permanent amendment to the Liquidation Trust, and was entered into by the Trust Managers in order to comply with the reorganization agreement between the owners and the Bondholders' Committee; that on November 29, 1935, a letter was sent to the non-depositing bondholders by the Committee, including Oglesby, in which the bondholders were advised that January 1, 1936, was the absolute deadline within which bonds would be accepted for deposit; and that in the event that bonds were not deposited by January 1, 1936, the Committee would "wash out" non-depositing bondholders; that the Committee accepted bonds from January 4, 1936, to September 17, 1936, and on

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29, 1935, a letter was sent to the non-depositing bondholders by  
between the owners and the Nonholders' Committee; that on November  
Managers in order to comply with the reorganization agreement  
to the Liquidation Trust, and was entered into by the Trust  
that this supplemental agreement constitutes a permanent amendment  
to the Trustee and reduce the Trust by a like number of units;"  
of units in the above mentioned certificates for 448 units issued  
National Bank, the Trustee shall cancel a corresponding number  
closure sale price which has been deposited with the Live Stock  
Bank by the holders thereof, for their pro rata share in the fore-  
that any of the bonds are surrendered to the Live Stock National  
issued to the Trustee by an equal number of units. In the event  
making the deposit and reduce the above mentioned certificates  
interest for a corresponding number of units to the bondholder  
deposited, the Trustee shall issue a certificate of beneficial  
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further for a certificate of beneficial interest for 448 units to  
placing of insurance and active management of the property; and  
Agency as the representative of the Trust Managers and for the  
with the Realty Renting Agency, and constituted the Realty Renting  
portion of income, the placing of the management of the property  
for the payment of certain expenses of reorganization and distri-  
redemption; that this amendment to the Liquidation Trust provided



September 17, 1936, the master certificate issued for the benefit of non-depositing bondholders was reduced from 448 units to 300 units; that in the latter part of 1936 Cochran and Downey were advised by the Committee that it had been unable to induce Oglesby to deposit \$10,000 of bonds owned and held by him, because Oglesby reported that he had been, since on or about September 1, 1936, prosecuting litigation against the Central Manufacturing District Bank and its Receiver; that he claimed that the Bondholders' Committee was an off-shoot or successor of certain factions of the Bank and feared that if he recognized the Committee and deposited his bonds with it he might jeopardize his claim against the Bank and its Receiver; that Oglesby's claim exceeded \$100,000; that thereafter the Committee and its attorney reported to Cochran and Downey that it was unable to obtain the deposit of the Oglesby bonds and requested that they take up negotiations with Oglesby; that they did so, and on March 27, 1937, plaintiff acquired Oglesby's bonds for one hundred cents on the dollar; that immediately after the acquisition of Oglesby's bonds plaintiff demanded that the Trust Managers exchange the bonds for certificates of beneficial interest, but Epstein and Schram, Trust Managers, from time to time evaded a determination as to whether they would accept the same for deposit until about sixty days before the filing of the complaint, when they declined; that on December 8, 1936, an offer was made by an outside purchaser who sought to purchase the property for \$165,000, a price which would net the depositing bondholders seventy-seven cents on the dollar; that pursuant to the offer Epstein and Schram proposed to liquidate the Trust and cancel the outstanding certificate for 300 units set up for non-depositing bondholders, but Rogan, the third Trust Manager, refused, maintaining that the outstanding certificate was irrevocable and not subject to cancellation by the Trust Managers; that in the communication sent to the bondholders, Trust Managers Epstein and Schram caused the Trustee to include a



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copy of a letter received by the Trustee and written by Epstein and Schram; that in this letter it is stated as follows: "Based on the above calculations, the Certificate Holders of the 3,683 units of Beneficial Interest should receive an immediate cash settlement of approximately 77 cents on the dollar. \* \* \* You are hereby authorized to close the Trust and cancel certificate for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after December 8, 1936, the holders of 1,741 units rejected the sale and the proposed modification of the trust; that on February 18, 1937, an additional offer for the sale of the property was received and a similar communication was sent by the Trustee to the bondholders; that this communication contained the same language: "Based on the above calculations, the certificate holders of 3,683 units of beneficial interest should receive cash settlement of approximately 80 cents on the dollar. \* \* \* You are hereby authorized to close the trust and cancel the certificate for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after the receipt of that communication the holders of 1,531 units rejected the proposed sale and proposed amendment, and likewise the attempt of Epstein and Schram to liquidate the Trust and cancel the outstanding certificate; that since the establishment of the trust and particularly since June 13, 1935, the rights of all parties interested in the 75th and Colfax Building have remained unchanged, except that certain expenses in the reorganization have been paid from the rents, and dividends have been paid unit-holders; that all expenses of the reorganization have been paid out of the rents and no individual bondholder nor the Committee has personally advanced any money toward the reorganization; that in addition to paying all expenses unit-holders have been paid about four per cent a year for the past two years; that the Realty



copy of a letter received by the Trustee and written by Epstein and Schram; that in this letter it is stated as follows: "Based on the above calculations, the Certificate Holders of the 3,683 units of Beneficial Interest should receive an immediate cash settlement of approximately 77 cents on the dollar. \* \* \* You are hereby authorized to close the Trust and cancel certificate for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after December 8, 1936, the holders of 1,741 units rejected the sale and the proposed modification of the trust; that on February 1, 1937, an additional offer for the sale of the property was received and a similar communication was sent by the Trustee to the bondholders; that this communication contained the same language: "Based on the above calculations, the certificate holders of 3,683 units of Beneficial Interest should receive cash settlement of approximately 80 cents on the dollar. \* \* \* You are hereby authorized to close the trust and cancel the certificate for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after the receipt of that communication the holders of 1,731 units rejected the proposed sale and proposed amendment, and likewise the attempt of Epstein and Schram to liquidate the Trust and cancel the outstanding certificate; that since the establishment of the trust and particularly since June 13, 1935, the rights of all parties interested in the 75th and Colfax Building have remained unchanged, except that certain expenses in the reorganization have been paid from the rents, and dividends have been paid unit-holders; that all expenses of the reorganization have been paid out of the rents and no individual bondholder nor the Committee has personally advanced any money toward the reorganization; that in addition to paying all expenses unit-holders have been paid about four per cent a year for the past two years; that the Realty



Renting Agency, the managing agent designated by the agreement of June 13, 1935, is a corporation in which Epstein and Schram are interested as stockholders and from which they have received certain dividends, and that plaintiff asks an accounting by them of all dividends received from this source; and plaintiff prays that "said The Live Stock National Bank of Chicago, a corporation, as Trustee under Trust Number 10893, known as the 75th and Colfax Building Liquidation Trust, may be compelled by order and direction of this court, to issue to this plaintiff, units of beneficial interest in the 75th and Colfax Building Liquidation Trust and being Number 10893 of The Live Stock National Bank of Chicago, in proportion to the bonds owned and held by it, and being one unit for every Fifty Dollars of principal of the bonds owned and held by this plaintiff, to-wit: One Hundred units; that the said The Live Stock National Bank of Chicago, a corporation, as Trustee under Trust Number 10893, etc., or the said Trust Managers, shall be compelled to pay to plaintiff the distribution of the income upon the same basis and in like proportion to that previously paid to other beneficial certificate holders, who had been permitted by said Trustee to have their bonds exchanged for beneficial certificates or units," etc.

Plaintiff states that the purpose of the complaint is "to compel the Reorganization Trustee and the Trust Managers to accept the bonds for deposit on the same basis as other bondholders and to issue beneficial certificates in exchange for its said bonds."

Plaintiff's major contention is that "the Supplement of June 13, 1935, sets up a permanent trust for the benefit of non-depositing bondholders unless the plaintiff is estopped by its conduct from claiming the benefit of the trust or laches bars its claims." The defendants who have filed a brief in this court contend that "the letter of June 13, 1935, does not set up a Trust, permanent or otherwise, for the benefit of non-depositing bondholders. It is merely a necessary instruction to the trustee as to its duties under

merely a necessary instruction to the trustee as to its duties under otherwise, for the benefit of non-depositing bondholders. It is letter of June 13, 1935, does not set up a Trust, permanent or defendants who have filed a brief in this court contend that "in claiming the benefit of the trust or laches bars its claims." The bondholders unless the plaintiff is estopped by its conduct from 13, 1935, sets up a permanent trust for the benefit of non-depositing Plaintiff's major contention is that "the Supplement of June issue beneficial certificates in exchange for its said bonds." the bonds for deposit on the same basis as other bondholders and to compel the Reorganization Trustee and the Trust Managers to accept Plaintiff states that the purpose of the complaint is "to for beneficial certificates or writs," etc.

who had been permitted by said Trustee to have their bonds exchanged tion to that previously paid to other beneficial certificate holders, the distribution of the income upon the same basis and in like proportion to the said Trust Managers, shall be compelled to pay to Plaintiff Chicago, a corporation, as Trustee under Trust Number 10893, etc., One Hundred units; that the said Live Stock National Bank of of principal of the bonds owned and held by this plaintiff, to-wit: owned and held by it, and being one unit for every Fifty Dollars The Live Stock National Bank of Chicago, in proportion to the bonds and Colfax Building Liquidation Trust and being Number 10893 of issue to this plaintiff, units of beneficial interest in the 75th Trust, may be compelled by order and direction of this court, to Trust Number 10893, known as the 75th and Colfax Building Liquidation Live Stock National Bank of Chicago, a corporation, as Trustee under bonds received from this source; and plaintiff prays that "said The dividends, and that plaintiff asks an accounting by them of all divi- interested as stockholders and from which they have received certain June 13, 1935, is a corporation in which Epstein and Schram are Renting Agency, the managing agent designated by the agreement of



the Liquidation Trust Agreement." Plaintiff's case is necessarily based upon its assumption that the letter of June 13, 1935, set up a permanent trust for the benefit of non-depositing bondholders.

On May 7, 1935, the sale under the foreclosure decree was approved, and non-depositing bondholders were given ninety days within which to deposit their bonds and accept the benefit of the purchase of the property at foreclosure. On May 9, 1935, the Bondholders' Committee and The Live Stock National Bank of Chicago, defendant, executed the Liquidation Trust Agreement, by which the Bank was made Trustee, and the title to the real estate was conveyed to the Bank under its Trust No. 10893. Under the Agreement, Epstein, Schram and Rogan were appointed Trust Managers, and the management of the Trust was placed in them, "it being the intention hereof that the affairs of this trust shall, except as herein otherwise specifically provided, be directed in all things by such Trust Managers," and that the action of a majority of the Trust Managers shall be binding upon the Trustee. While the Agreement does not specify the duties of the Trustee in reference to the property, it does provide, as we have heretofore stated, that the Trustee shall be bound to comply with the instructions of the Trust Managers. It provides: "Upon the written direction of the Trust Managers, the Trustee shall prepare a book containing forms of certificates of interest, and the Trustee shall issue and deliver such certificates of interest for such total number of units, and to such persons, and in such amounts, as the Trust Managers and the Bondholders Committee may direct;" that upon the issuance of such certificate or certificates of interest, the Certificate of Beneficial Interest issued to the Bondholders' Committee is to become void and of no effect and is to be surrendered and canceled by the Trustee. The letter of June 13, 1935, provides for the issuance of Certificates of Beneficial Interest, and contains a statement of the existing indebtedness of the property and the proposed method of its retirement, provisions



the liquidation Trust Agreement." Plaintiff's case is necessarily based upon its assumption that the letter of June 13, 1935, set up a permanent trust for the benefit of non-depositing bondholders. On May 7, 1935, the sale under the foreclosure decree was approved, and non-depositing bondholders were given ninety days within which to deposit their bonds and accept the benefit of the purchase of the property at foreclosure. On May 9, 1935, the Bondholders' Committee and The Live Stock National Bank of Chicago, defendant, executed the liquidation Trust Agreement, by which the Bank was made Trustee, and the title to the real estate was conveyed to the Bank under its Trust No. 10893. Under the Agreement, Epstein, Gehran and Rogan were appointed Trust Managers, and the management of the Trust was placed in them, "it being the intention hereof that the affairs of this trust shall, except as herein otherwise specifically provided, be directed in all things by such Trust Managers," and that the action of a majority of the Trust Managers shall be binding upon the Trustee. While the Agreement does not specify the duties of the Trustee in reference to the property, it does provide, as we have heretofore stated, that the Trustee shall be bound to comply with the instructions of the Trust Managers. It provides: "Upon the written direction of the Trust Managers, the Trustee shall prepare a book containing forms of certificates of interest, and the Trustee shall issue and deliver such certificates of interest for such total number of units, and to such persons, and in such amounts, as the Trust Managers and the Bondholders Committee may direct;" that upon the issuance of such certificate or certificates of interest, the Certificate of Beneficial Interest issued to the Bondholders' Committee is to become void and of no effect and is to be surrendered and canceled by the Trustee. The letter of June 13, 1935, provides for the issuance of Certificates of Beneficial Interest, and contains a statement of the existing indebtedness of the property and the proposed method of its retirement, provisions

for the issuance of certificates of indebtedness, distribution of net income, management, taxes, the kinds and amounts of insurance to be carried, and a direction to issue lists of certificate holders and to render statements. The following are the provisions in reference to the issuance of Certificates of Beneficial Interest:

"1. Certificates of Beneficial Interest

"The 75th & Colfax Building Liquidation Trust was set up for Four Thousand Fifteen units of \$50.00 each. The Trustee is hereby authorized and instructed:

"To cancel bond No. 261 of the 75th & Colfax Building 6% First Mortgage Real Estate Gold Bond issue, due February 15, 1935, with February 15, 1933 and subsequent interest coupons attached.

"To cancel ten units in the liquidation trust, reducing the outstanding number of units from four thousand fifteen to four thousand five.

"The outstanding units in the Trust shall be issued as follows:

"(1) Certificates of beneficial interest for two thousand eight hundred seventy-two units, which the Trustee is authorized to exchange for certificates of deposit now outstanding on the 75th & Colfax Building on the basis of one unit for each \$50.00 face value of the bonds.

"(2) One certificate of beneficial interest for ten units, to be issued to Wm. L. O'Connell, Receiver, Central Manufacturing District Bank, 7 South Dearborn Street, Chicago, Illinois, and to be delivered to Wm. L. O'Connell, Receiver in exchange for the \$50.00 bond of the 75th & Colfax Building held by the said Wm. L. O'Connell, Receiver, which bond has not been deposited with the Live Stock National Bank, depository, it being expressly understood that the above mentioned bond will be delivered to the Trustee or to the Committee.

"(3) Certificate of beneficial interest for three hundred ten units, to be issued to Trustees, Central Manufacturing District

for the issuance of certificates of indebtedness, distribution of net income, management, taxes, the kinds and amounts of insurance to be carried, and a direction to issue lists of certificate holders and to render statements. The following are the provisions in reference to the issuance of Certificates of Beneficial Interest:

"1. Certificates of Beneficial Interest

"The 7th & Colfax Building Liquidation Trust was set up for four thousand fifteen units of \$50.00 each. The Trustee is hereby authorized and instructed:

"To cancel bond No. 261 of the 7th & Colfax Building & First Mortgage Real Estate Gold Bond issue, due February 15, 1935, with February 15, 1933 and subsequent interest coupons attached.

"To cancel ten units in the liquidation trust, reducing the outstanding number of units from four thousand fifteen to four thousand five.

"The outstanding units in the trust shall be issued as follows:

"(1) Certificates of beneficial interest for two thousand eight hundred seventy-two units, which the Trustee is authorized to exchange for certificates of deposit now outstanding on the 7th & Colfax Building on the basis of one unit for each \$50.00 face value of the bonds.

"(2) One certificate of beneficial interest for ten units, to be issued to Wm. L. O'Connell, Receiver, Central Manufacturing District Bank, 7 South Dearborn Street, Chicago, Illinois, and to be delivered to Wm. L. O'Connell, Receiver in exchange for the \$50.00 bond of the 7th & Colfax Building held by the said Wm. L. O'Connell, Receiver, which bond has not been deposited with the Five Stock National Bank, depository, it being expressly understood that the above mentioned bond will be delivered to the Trustee or to the Committee.

"(3) Certificate of beneficial interest for three hundred ten units, to be issued to Trustees, Central Manufacturing District



in exchange for the \$15,500.00 bonds of the 75th & Colfax Building held by the said Trustees, it being expressly understood that the above mentioned bonds will be delivered to the Trustee or to the Committee.

"(4) Certificates of beneficial interest aggregating three hundred sixty-five units, as follows: (Due equity owner under agreement for title)

"18 certs for ten units each, total one hundred eighty units, to Ruth E. Downey;

"1 certificate for two units, to Ruth E. Downey;

"18 certificates for ten units each, total one hundred eighty units, to Thomas H. Cochran;

"1 certificate for two units, to Thos. H. Cochran;

"1 certificate for one unit, to William C. Burns

"The said certificates to be delivered to Anderson & Anderson, 69 West Washington Street, Chicago, Illinois

"(5) Certificate of beneficial interest for four hundred forty-eight units, to be issued to The Live Stock National Bank of Chicago, Trustee under Trust No. 10893, representing the twenty-two thousand four hundred dollars undeposited bonds of this issue (other than those mentioned in paragraphs 2 and 3 above), said undeposited bonds being as follows:

"(75th & Colfax Building)

| Amount    | Name of Owner     | Address of Owner                                        | Bond No. |
|-----------|-------------------|---------------------------------------------------------|----------|
| \$ 100.00 | Rose Berg         | 2917 Lyman St.                                          | 160      |
| 500.00    | Christ Budde      | 3122 S. Morgan St.                                      | 403      |
| 500.00    | Margaret Durkin   | 6522 S. Maplewood Ave.                                  | 328      |
| 1,000.00  | Michael Durkin    | 600 Maryland St., Gary, Ind.                            | 326,327  |
| 200.00    | Mildred E. French | 3901 N. Hoyne Ave.                                      | 242,130  |
| 100.00    | Frank Grudis      | 5747 S. Morgan St.                                      | 223      |
| 200.00    | Maria Heftowski   | 3222 Wall St.                                           | 213,147  |
| 500.00    | Della Hobert      | 834 E. 80th St.                                         | 286      |
| 200.00    | Chas. Kalczinski  | Telsiu Aps., Alsedziu Pastas, Brevikiu Kaimo, Lithuania | 14,142   |
| 1,000.00  | Antonia Kuffel    | 2019 W. 41st Pl.                                        | 177,179  |
| 2,000.00  | Barbara Kuncienie | 3326 S. Lithuania Ave.                                  | 469,470  |
| 100.00    | Frank Lepszynski  | 3356 S. Wall St.                                        | 131      |

in exchange for the \$15,500.00 bonds of the Fifth & Colfax Building held by the said Trustee, it being expressly understood that the above mentioned bonds will be delivered to the Trustee or to the Committee.

"(4) Certificates of beneficial interest aggregating three hundred sixty-five units, as follows: (One equity owner

under agreement for title)

"18 cents for ten units each, total one hundred eighty

units, to Ruth E. Downey;

"1 certificate for two units, to Ruth E. Downey;

"18 certificates for ten units each, total one hundred

eighty units, to Thomas H. Cochran;

"1 certificate for two units, to Thomas H. Cochran;

"1 certificate for one unit, to William C. Burns;

"The said certificates to be delivered to Anderson &

Anderson, 69 West Washington Street, Chicago, Illinois

"(5) Certificate of beneficial interest for four hundred

forty-eight units, to be issued to The Live Stock National Bank

of Chicago, Trustee under Trust No. 10893, representing the

twenty-two thousand four hundred dollars undeposited bonds of

this issue (other than those mentioned in paragraphs 2 and 3

above), said undeposited bonds being as follows:

"(Fifth & Colfax Building)

| Amount    | Name of Owner     | Address of Owner                  | Bond No. |
|-----------|-------------------|-----------------------------------|----------|
| \$ 100.00 | Rose Barr         | 2917 Lyman St.                    | 180      |
| 500.00    | Christ Budge      | 3122 S. Morgan St.                | 403      |
| 500.00    | Margaret Durkin   | 6722 S. Maplewood Ave.            | 328      |
| 1,000.00  | Michael Durkin    | 600 Maryland St., Gary, Ind.      | 326, 327 |
| 200.00    | Mildred E. French | 3901 W. Hoyne Ave.                | 142, 130 |
| 100.00    | Frank Grady       | 3747 S. Morgan St.                | 223      |
| 200.00    | Maria Rafiowski   | 3222 Wall St.                     | 213, 147 |
| 500.00    | Della Robert      | 834 E. 80th St.                   | 286      |
| 200.00    | Chas. Kalochnak   | Tolson Ave., Alsdain              |          |
|           |                   | Pastor, Brevikin Kaimo, Lithuania | 14, 142  |
| 1,000.00  | Antonia Kufel     | 2019 W. 41st Pl.                  | 177, 179 |
| 2,000.00  | Barbara Kucienis  | 3326 S. Lithuania Ave.            | 402, 470 |
| 100.00    | Frank Lepaszynski | 3326 S. Wall St.                  | 131      |

|           |                                           |                                 |            |
|-----------|-------------------------------------------|---------------------------------|------------|
| 10,000.00 | John G. Oglesby                           | Elkhart (Logan Co.)             | 391 to 399 |
|           |                                           | 111.                            | 302 to 312 |
| 100.00    | George Rosner                             | 3021 Bonfield St.               | 143        |
| 500.00    | Antonette Socha<br>or Genevieve<br>Morgan | 1238 W. 31st St.                | 355        |
| 100.00    | Walter or Anna<br>Smiehowski              | 3326 Mosspratt St.              | 102        |
| 1,000.00  | Walter Ulanski                            | 3027 Bonfield St.               | 479        |
| 200.00    | Jos. Vitale                               | 2712 W. Polk St.                | 154,155    |
| 1,000.00  | Mary Widurgiris                           | 4 W. Jackson Blvd.,<br>Oak Park | 330,331    |
| 1,000.00  | Bernice Wicklinski                        | 948 W. 32nd St.                 | 425,428    |
| 1,000.00  | Mrs. Helen<br>Wroblewski                  | 4748 S. Keeler Ave              | 478        |
| 500.00    | Frank Jimmy                               | 5245 S. Racine Ave.             | 421        |
| 500.00    | L. J. McNamara                            | 2728 East 77th St.              | 173        |
| 100.00    | M.C. Kelly (?)                            | 1655 Carmen Ave. (?)            | 204        |

\$22,400.00

"If and when any of said bonds are subsequently deposited, the Trustee shall issue a certificate of beneficial interest for a corresponding number of units to the bondholder making the deposit and reduce the above mentioned certificate issued to the Trustee by an equal number of units.

"In the event that any of the bonds are surrendered to the Live Stock National Bank by the holders thereof for their pro rata share in the foreclosure sale price which has been deposited with The Live Stock National Bank, the Trustee shall cancel a corresponding number of units in the above mentioned certificate for 448 units issued to the Trustee and reduce the Trust by a like number of units."

We agree with defendants' contention that the Trustee would have been unable to function under the provisions of the Trust Agreement, alone, and we also agree with their interpretation of the letter of June 13, 1935, that by it, the Trust Managers, upon whom devolved the duty to manage the Trust, gave instructions to the Trustee to perform certain duties, thereby enabling the Trustee to function as to said duties. When this letter was written the non-depositing bondholders had, by the decree entered by the court, until August 9, 1935, to deposit their bonds and



|             |                   |                      |            |
|-------------|-------------------|----------------------|------------|
| 10,000.00   | John G. O'Leary   | Elmhart (Logan Co.)  | 391 to 399 |
| 100.00      | George Rosner     | 111                  | 302 to 312 |
| 700.00      | Antoinette Kocha  | 3021 Bondfield St.   | 143        |
|             | or Genevieve      |                      |            |
| 100.00      | Morgan            | 1238 W. 31st St.     | 377        |
|             | Walter or Anna    |                      |            |
|             | Smithowalski      | 3326 Rossmore St.    | 105        |
| 1,000.00    | Alister Ulanak    | 3027 Bondfield St.   | 479        |
| 200.00      | Jos. W. Wale      | 2712 W. Polk St.     | 154, 155   |
| 1,000.00    | Mary Widurgis     | 4 W. Jackson Bldg.   |            |
|             |                   | Oak Park             | 330, 331   |
| 1,000.00    | Bernice Wickinski | 948 W. 32nd St.      | 457, 458   |
| 1,000.00    | Mrs. Helen        |                      |            |
|             | Problewski        | 4748 S. Keeler Ave   | 478        |
| 500.00      | Frank Jimmy       | 5247 S. Racine Ave   | 481        |
| 500.00      | L. J. McManara    | 5228 East 77th St.   | 173        |
| 100.00      | M.C. Kelly (?)    | 1855 Garman Ave. (?) | 204        |
| <hr/>       |                   |                      |            |
| \$25,400.00 |                   |                      |            |

"If and when any of said bonds are subsequently deposited, the Trustee shall issue a certificate of beneficial interest for a corresponding number of units to the bondholder making the deposit and reduce the above mentioned certificate issued to the Trustee by an equal number of units.

"In the event that any of the bonds are surrendered to the Live Stock National Bank by the holders thereof for their pro rata share in the foreclosure sale price which has been deposited with The Live Stock National Bank, the Trustee shall cancel a corresponding number of units in the above mentioned certificate for 448 units issued to the Trustee and reduce the Trust by a like number of units."

"We agree with defendants' contention that the Trustee would have been unable to function under the provisions of the Trust Agreement, alone, and we also agree with their interpretation of the letter of June 13, 1935, that by it, the Trust Managers, upon whom devolved the duty to manage the Trust, gave instructions to the Trustee to perform certain duties, thereby enabling the Trustee to function as to said duties. When this letter was written the non-depositing bondholders had, by the decree entered by the court, until August 9, 1935, to deposit their bonds and

accept the benefit of the Trust, but it was necessary to make some provision for the issuance of certificates to the bondholders who deposited within the specified time; therefore, the Trust Managers directed the Trustee to issue to itself a certificate for 448 units out of which new certificates to subsequent depositors could be made. The instructions were intended to carry out the provisions in the decree as to bondholders who had not deposited their bonds. Plaintiff argues that "the supplemental agreement of June 13, 1935, constitutes a permanent amendment to the Liquidation Trust, and was entered into by the Trust Managers in order to comply with the reorganization agreement between the owners and the Bondholders' Committee and could not be changed at the will of the Trust Managers." As we interpret the letter, it conforms to the Liquidation Trust Agreement of May 9, 1935, and it did not set up a permanent trust for the benefit of non-depositing bondholders. We cannot agree with plaintiff's argument that the Trust Managers, after they gave to the Trustee the directions contained in the letter, had no power thereafter to revoke the directions or to give new or different instructions for the guidance of the Trustee. Nor can we agree with the further argument that after the Trust Managers had written the letter of June 13, 1935, nothing but the Statute of Limitations, after notice to every non-depositing bondholder, could terminate the right of non-depositing bondholders to deposit their bonds. The contention of plaintiff, in our judgment, is without merit.

Plaintiff contends that "the effect of enforcing the directions of the Trust Managers to close the Trust as of December 3, 1936, amounted in law to a forfeiture of bondholders' existing rights." It appears from the complaint that plaintiff acquired the bonds from Oglesby on March 27, 1937, two years after the foreclosure, and paid to Oglesby the full face value of the bonds although the best offer that had been received for the property would not the bondholders

accept the benefit of the Trust, but it was necessary to make some provision for the issuance of certificates to the bondholders who deposited within the specified time; therefore, the Trust Managers

directed the Trustee to issue to itself a certificate for 448

units out of which new certificates for subsequent depositors could

be made. The instructions were intended to carry out the provisions

in the decree as to bondholders who had not deposited their bonds.

Plaintiff argues that "the supplemental agreement of June 13, 1935,

constitutes a permanent amendment to the Liquidation Trust, and

was entered into by the Trust Managers in order to comply with the

reorganization agreement between the owners and the bondholders,

Committee and could not be changed at the will of the Trust Managers."

As we interpret the letter, it conforms to the Liquidation Trust

Agreement of May 9, 1935, and it did not set up a permanent trust

for the benefit of non-depositing bondholders. We cannot agree

with plaintiff's argument that the Trust Managers, after they gave

to the Trustee the directions contained in the letter, had no power

thereafter to revoke the directions or to give new or different

instructions for the guidance of the Trustee. Nor can we agree

with the further argument that after the Trust Managers had written

the letter of June 13, 1935, nothing but the Statute of Limitations,

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the right of non-depositing bondholders to deposit their bonds.

The contention of plaintiff, in our judgment, is without merit.

Plaintiff contends that "the effect of enforcing the directions

of the Trust Managers to close the Trust as of December 31, 1936,

amounted in law to a forfeiture of bondholders' existing rights."

It appears from the complaint that plaintiff acquired the bonds from

Oglesby on March 27, 1937, two years after the foreclosure, and paid

to Oglesby the full face value of the bonds although the best offer

that had been received for the property would not the bondholders



only eighty cents on the dollar. Cochran and Downey were the owners of the property, and Downey is president, a director and a stockholder of the plaintiff company. Rogan, a defendant and one of the Trust Managers, acted for plaintiff in purchasing the bonds from Oglesby. From March 22, 1933, until September, 1936, great efforts were made to obtain the deposit of bonds, first through the Committee and then through the Trustee under the Liquidation Trust. After March 22, 1933, "the Committee did put on a drive, but it was unable to obtain a deposit of all or a greater portion of the bonds, within six months of the agreement of March 22, 1933. From March 22, 1933, until July, 1935, the Committee requested additional time, and various extensions were granted by the owners to the Committee in writing." "During the time between March 22, 1933, and February 25, 1935, the said Committee constantly represented to the owners (Cochran and Downey) that it was rapidly proceeding with the reorganization of the building and would, without a doubt, obtain the deposit of all the outstanding bonds; that said Committee likewise, during said period, represented that it was necessary that the foreclosure be completed and various other devices used in order to obtain a complete deposit of the outstanding bonds." It further appears that a notice was mailed to each non-depositing bondholder on May 7, 1935, notifying him that in the order approving the foreclosure sale he had been given ninety days within which to deposit his bonds; that on or about November 29, 1935, a letter was sent to each non-depositing bondholder, including Oglesby, urging him to deposit his bonds and setting a final deadline of January 1, 1936; that about December 3, 1936, Epstein and Schram, two of the Trust Managers, directed the Trustee to close the Trust and to cancel the remainder of the certificate that had been issued to itself; that this certificate, originally for 448 units, had then been reduced to 300 units; that the certificate was thereupon canceled by the

only eighty cents on the dollar. Cochran and Downey were the owners of the property, and Downey is president, a director and a stockholder of the plaintiff company. Hogan, a defendant and one of the Trust Managers, acted for plaintiff in purchasing the bonds from Oglesby. From March 22, 1933, until September, 1936, great efforts were made to obtain the deposit of bonds, first through the Committee and then through the Trustee under the Liquidation Trust. After March 22, 1933, "the Committee did put on a drive, but it was unable to obtain a deposit of all or a greater portion of the bonds, within six months of the agreement of March 22, 1933. From March 22, 1933, until July, 1935, the Committee requested additional time, and various extensions were granted by the owners to the Committee in writing." "During the time between March 22, 1933, and February 22, 1935, the said Committee constantly represented to the owners (Cochran and Downey) that it was rapidly proceeding with the reorganization of the building and would, without a doubt, obtain the deposit of all the outstanding bonds; that said Committee likewise, during said period, represented that it was necessary that the foreclosure be completed and various other devices used in order to obtain a complete deposit of the outstanding bonds." It further appears that a notice was mailed to each non-depositing bondholder on May 7, 1935, notifying him that in the order approving the foreclosure sale he had been given ninety days within which to deposit his bonds; that on or about November 29, 1935, a letter was sent to each non-depositing bondholder, including Oglesby, urging him to deposit his bonds and setting a final deadline of January 1, 1936, that about December 3, 1936, Epstein and Gehman, two of the Trust Managers, directed the Trustee to close the Trust and to cancel the remainder of the certificate that had been issued to itself; that this certificate, originally for 448 units, had then been reduced to 300 units; that the certificate was thereupon canceled by the



Trustee on December 7, 1936. Rogan refused to join Epstein and Schram as Trust Managers in giving the instruction to close the Trust. The complaint alleges that in the fall of 1936 the Bondholders' Committee requested Cochran, Downey and Rogan to try to get the Oglesby bonds in. The complaint does not state the date of the request, but alleges that during the latter part of the year 1936 Cochran and Downey were advised by the Committee that it had been unable to induce Oglesby to deposit his bonds; "that thereafter the said Committee and its attorney \* \* \* requested that the attorney for said Cochran and Downey endeavor to induce the said Oglesby to deposit his bonds;" that "after many months of negotiation, the said bonds were acquired by this plaintiff March 27, 1937 from \* \* \* Oglesby." The complaint shows that Oglesby had been solicited many times to deposit his bonds but that he always refused to do so and that he never did deposit his bonds nor offer to deposit them. The complaint alleges that he stated that he did not care to deposit his bonds because if he did deposit them it might jeopardize a claim he had against the Central Manufacturing District Bank and its Receiver for over \$100,000. It is a reasonable inference from the facts alleged that Oglesby expected, in any event, to collect his bonds from Downey and Cochran, the owners of the property, and he finally did receive the face value of his bonds from plaintiff corporation, of which Downey was the president, a director and a stockholder. If Oglesby were the plaintiff in this proceeding he could not justly complain that the trust was finally closed against him, and even if it could be assumed that some sort of a new right was given the bondholders who had not deposited their bonds by the letter of June 13, 1935, that fact would avail Oglesby nothing in view of the attitude that he had constantly assumed. Plaintiff, who claims to stand in the shoes of Oglesby, had no greater rights against the Trust or the Trust Managers than Oglesby had on March 27, 1937. Indeed, plaintiff was represented in the purchase of the Oglesby



Indeed, plaintiff was represented in the purchase of the Oglesby Trust or the Trust Managers than Oglesby had on March 27, 1937. to stand in the shoes of Oglesby, had no greater rights against the the attitude that he had constantly assumed. Plaintiff, who claims of June 13, 1935, that fact would avail Oglesby nothing in view of given the bondholders who had not deposited their bonds by the letter and even if it could be assumed that some sort of a new right was not justly complain that the trust was finally closed against him, holder. If Oglesby were the plaintiff in this proceeding he could corporation, of which Downey was the president, a director and a stock- finally did receive the face value of his bonds from plaintiff cor- bonds from Downey and Cochran, the owners of the property, and he facts alleged that Oglesby expected, in any event, to collect his Receiver for over \$100,000. It is a reasonable inference from the he had against the Central Manufacturing District Bank and its complaint alleges that he stated that he did not care to deposit his bonds because if he did deposit them it might jeopardize a claim Oglesby." The complaint shows that Oglesby had been solicited many bonds were acquired by this plaintiff March 27, 1937 from \* \* \* deposit his bonds;" that "after many months of negotiation, the said for said Cochran and Downey endeavor to induce the said Oglesby to the said Committee and its attorney \* \* \* requested that the attorney been unable to induce Oglesby to deposit his bonds; that thereafter 1936 Cochran and Downey were advised by the Committee that it had of the request, but alleges that during the latter part of the year to get the Oglesby bonds in. The complaint does not state the date Bondholders' Committee requested Cochran, Downey and Hogan to try Trust. The complaint alleges that in the fall of 1936 the Schram as Trust Managers in giving the instruction to close the Trustee on December 7, 1936. Hogan refused to join Epstein and

bonds by an able, experienced lawyer, who, as one of the Trust Managers, was thoroughly familiar with the situation, and his knowledge is the knowledge of plaintiff. After a careful consideration of the allegations of the complaint we are unable to find any real equities in favor of plaintiff. The complaint shows conclusively that the Trust Managers were anxious and willing to have all bondholders deposit their bonds, and it is idle to argue that their order to the Trustee to close the Trust was in the nature of a forfeiture of Oglesby's rights. We are not unmindful of the fact that the complaint alleges that the Bondholders' Committee, in the latter part of 1936, requested Cochran and Downey to take up negotiations with Oglesby with a view to have him deposit his bonds. But in our consideration of the alleged request we have also considered certain material facts that bear upon the request: (1) The Bondholders' Committee (the members of which were not made parties to this suit) had nothing to do with the management of the Trust in December, 1936, nor in March, 1937; and (2) Rogan, as one of the Trust Managers, knew that the Trust had been closed in December, 1936, which was long prior to the time when he bought the bonds from Oglesby for plaintiff. The second amended complaint, filed April 29, 1940, alleges that plaintiff "for the past two years has repeatedly demanded" that the defendants accept the bonds owned by plaintiff and issue to it, in lieu thereof, beneficial certificates on the same basis as to other bondholders. From the aforesaid allegations it must be assumed that the first demand made by plaintiff upon the Trustee to accept the bonds and issue beneficial certificates therefor was made not earlier than April 29, 1938, which was more than a year after the bonds were purchased from Oglesby, and more than a year and four months after the closing of the Trust.

Plaintiff contends: (1) "If Epstein and Schram, the majority of the Trust Managers, have received dividends as stockholders of the



bonds by an able, experienced lawyer, who, as one of the Trust Managers, was thoroughly familiar with the situation, and his knowledge is the knowledge of plaintiff. After a careful consideration of the allegations of the complaint we are unable to find any real equities in favor of plaintiff. The complaint shows conclusively that the Trust Managers were anxious and willing to have all bondholders deposit their bonds, and it is idle to argue that their order to the Trustee to close the Trust was in the nature of a forfeiture of Oglesby's rights. We are not unmindful of the fact that the complaint alleges that the Bondholders' Committee, in the latter part of 1936, requested Cochran and Downey to take up negotiations with Oglesby with a view to have him deposit his bonds. But in our consideration of the alleged request we have also considered certain material facts that bear upon the request: (1) The Bondholders' Committee (the members of which were not made parties to this suit) had nothing to do with the management of the Trust in December, 1936, nor in March, 1937; and (2) No one, as one of the Trust Managers, knew that the Trust had been closed in December, 1936, which was long prior to the time when he bought the bonds from Oglesby for plaintiff. The second amended complaint, filed April 29, 1940, alleges that plaintiff "for the past two years has repeatedly demanded" that the defendants accept the bonds owned by plaintiff and issue to it, in lieu thereof, beneficial certificates on the same basis as to other bondholders. From the aforesaid allegations it must be assumed that the first demand made by plaintiff upon the Trustee to accept the bonds and issue beneficial certificates therefor was made not earlier than April 29, 1938, which was more than a year after the bonds were purchased from Oglesby, and more than a year and four months after the closing of the Trust.

Plaintiff contends: (1) "If Upstein and Scherer, the majority of the Trust Managers, have received dividends as stockholders of the



Realty Renting Agency, they must account to the Trust;" and (2) "Plaintiff was entitled to a hearing upon the questions raised by the complaint." We have considered plaintiff's very brief argument in support of these two contentions and find it without merit. If we are right in our ruling as to plaintiff's first two contentions, the last two contentions necessarily fail.

The judgment order of the Superior court of Cook county dismissing this cause for want of equity is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan and Friend, JJ., concur.

Realty Renting Agency, they must account to the Trust;" and (2) "Plaintiff was entitled to a hearing upon the questions raised by the complaint." We have considered Plaintiff's very brief argument in support of these two contentions and find it without merit. If we are right in our ruling as to Plaintiff's first two contentions, the last two contentions necessarily fail.

The judgment order of the Superior Court of Cook County

dismissing this case for want of equity is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan and Friend, JJ., concur.

41660

CROWN AUTOMOTIVE SALES & MFG. CO.,  
Appellee,

v.

LEE M. GOLDSTEIN, doing business as  
LEE M. GOLDSTEIN & COMPANY,  
Appellant.

42  
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

314 I.A. 566<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT,

An action in contract to recover for goods and merchandise delivered by plaintiff to the Miles Equipment Manufacturing Company upon an alleged oral agreement by defendant to pay plaintiff for the merchandise delivered to said Company. There was a trial before the court without a jury and a finding for plaintiff for \$1,205.75. Defendant appeals from a judgment entered upon the finding.

Plaintiff's theory of fact is that it was doing business with the Miles Equipment Manufacturing Company and that on May 31, 1937, it felt insecure in its dealings with the said Company. Defendant had financed the operations of the Equipment Company by discounting its accounts receivable so that it might obtain money to pay for raw material, and in some cases defendant had loaned said Company money to pay for raw material. As security said Company gave defendant a chattel mortgage that covered all of its finished goods and goods in process of manufacture. Defendant also represented the said Company in selling its products, for which he received five per cent commission. Plaintiff's evidence was to the effect that about May 31, 1937, it entered into an oral agreement with defendant by the terms of which plaintiff sold goods, wares and merchandise to defendant and billed the defendant for the same, but that at the request and direction of defendant it shipped the goods to the Equipment Company. Defendant's theory of fact is that he never entered into the oral agreement alleged by plaintiff, but that even if he did enter into the said oral agreement he clearly and unequivocally revoked the agreement prior to the completion of



GROWN AUTOMOTIVE SALES & CO.,  
Appellee,  
v.  
LEE M. GOLDSTEIN, doing business as  
LEE M. GOLDSTEIN & COMPANY,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

3141 A. 566

MR. PRESIDING JUSTICE SCHEIDT DELIVERED THE OPINION OF THE COURT.  
An action in contract to recover for goods and merchandise delivered by plaintiff to the Miles Equipment Manufacturing Company upon an alleged oral agreement by defendant to pay plaintiff for the merchandise delivered to said Company. There was a trial before the court without a jury and a finding for plaintiff for \$1,205.75. Defendant appeals from a judgment entered upon the finding.  
Plaintiff's theory of fact is that it was doing business with the Miles Equipment Manufacturing Company and that on May 31, 1937, it felt insecure in its dealings with the said Company. Defendant had financed the operations of the Equipment Company by discounting its accounts receivable so that it might obtain money to pay for raw material, and in some cases defendant had loaned said Company money to pay for raw material. As security said Company gave defendant a chattel mortgage that covered all of its finished goods and goods in process of manufacture. Defendant also represented the said Company in selling its products, for which he received five per cent commission. Plaintiff's evidence as to the effect that about May 31, 1937, it entered into an oral agreement with defendant by the terms of which plaintiff sold goods, wares and merchandise to defendant and billed the defendant for the same, but that at the request and direction of defendant it shipped the goods to the Equipment Company. Defendant's theory of fact is that he never entered into the oral agreement alleged by plaintiff, but that even if he did enter into the said oral agreement he clearly and unambiguously revoked the agreement prior to the completion of

performance by plaintiff.

The decision of the case by the trial court involved a finding upon two issues of fact, first, was there an oral agreement whereby the defendant Goldstein was to pay for the merchandise delivered to the Miles Equipment Manufacturing Company; and, second, was there a termination of the agreement. Each side offered evidence to sustain its theory of fact. Plaintiff contended that the testimony to support its theory of fact was credible and that the testimony in support of defendant's theory of fact was perjured. Defendant contends that the evidence he offered was credible and that the testimony offered by plaintiff was perjury. It is certain that either the claim or the defense to it is based upon perjured. The trial judge saw and heard the witnesses and had advantages which we do not possess in passing upon their credibility. He found that plaintiff's claim was a bona fide one and that defendant's defense was not an honest one. We would certainly not be justified in holding that the trial court's finding is manifestly contrary to the weight of the evidence. Moreover, there are certain mountain peaks in the testimony that point the way to the truth and that satisfy us that the trial court was justified in his finding.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

performance by plaintiff.

The decision of the case by the trial court involved a

finding upon two issues of fact, first, was there an oral agree-

ment whereby the defendant defendant was to pay for the merchandise

delivered to the defendant defendant Manufacturing Company; and, second,

was there a termination of the agreement. Each side offered evidence

to sustain its theory of fact. Plaintiff contended that the testi-

mony to support its theory of fact was credible and that the testi-

mony in support of defendant's theory of fact was perjured. Defen-

dant contended that the evidence he offered was credible and that the

testimony offered by plaintiff was perjured. It is certain that either

the claim or the defense to it is based upon perjury. The trial judge

saw and heard the witnesses and had advantages which we do not possess

in passing upon their credibility. He found that plaintiff's claim

was a bona fide one and that defendant's defense was not an honest

one. He would certainly not be justified in holding that the trial

court's finding is manifestly contrary to the weight of the evidence.

Moreover, there are certain mountain peaks in the testimony that

point the way to the truth and that satisfy us that the trial court

was justified in his finding.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, J.L., counsel.



41784

ADDIE MOURANT,  
Appellant,

v.

THE PULLMAN TRUST & SAVINGS  
BANK, an Illinois corporation,  
and PULLMAN TRUST & SAVINGS  
BANK, an Illinois corporation,  
Appellees.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

314 I.A. 567

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover moneys paid by her under two written contracts in each of which she agreed to buy a lot in Cook county. Plaintiff filed a second amended complaint. Upon motion of defendants the suit was dismissed at plaintiff's costs "because said second amended complaint states no cause of action." Plaintiff appeals.

The second amended complaint consists of two counts. Count two is the same as count one save that it is based upon a contract between the same parties covering a different lot. Count one reads as follows:

"1. That on January 2, 1926, Addie Mourant entered into an Agreement to purchase Lot 27 in Calumet Parkview Subdivision, according to the plat thereof, in Cook County, Illinois, from The Pullman Trust and Savings Bank, an Illinois Corporation, as Trustee under Trust Agreement known as Trust No. 647, and pursuant thereto paid the sum of Five Hundred Twenty Nine Dollars and Sixty Five Cents as follows:- Three Hundred Seventy Five Dollars stated in said contract to have been paid at the signing and delivery thereof, One Hundred Thirty Eight Dollars on December 21, 1926, and Sixteen Dollars and Sixty Five Cents on September 7, 1927, in the form of principal, interest, taxes and special assessments, the exact amount being within the peculiar knowledge and possession of The Pullman Trust and Savings Bank and Pullman Trust and Savings Bank, Trustee and Successor Trustee, respectively, of Trust Agreement known as

41784

ADDIE MOUNTANT,  
Appellant,

v.

THE PULMAN TRUST & SAVINGS  
BANK, an Illinois corporation,  
and PULMAN TRUST & SAVINGS  
BANK, an Illinois corporation,  
Appellees.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

3141.A. 567

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover money paid by her under two

written contracts in each of which she agreed to buy a lot in Cook

county. Plaintiff filed a second amended complaint. Upon motion

of defendants the suit was dismissed at plaintiff's costs "because

said second amended complaint states no cause of action." Plaintiff

appeals.

The second amended complaint consists of two counts. Count

two is the same as count one save that it is based upon a contract

between the same parties covering a different lot. Count one reads

as follows:

"1. That on January 2, 1926, Addie Mountant entered into an

Agreement to purchase lot 27 in Calumet Parkview Subdivision,

according to the plat thereof, in Cook County, Illinois, from The

Pulman Trust and Savings Bank, an Illinois Corporation, as Trustee

under Trust Agreement known as Trust No. 647, and pursuant thereto

paid the sum of Five Hundred Twenty Nine Dollars and Sixty Five

Cents as follows:-- Three Hundred Seventy Five Dollars stated in

said contract to have been paid at the signing and delivery thereof,

One Hundred Thirty Eight Dollars on December 21, 1926, and Sixteen

Dollars and Sixty Five Cents on September 7, 1927, in the form of

principal, interest, taxes and special assessments, the exact amount

being within the peculiar knowledge and possession of The Pulman

Trust and Savings Bank and Pulman Trust and Savings Bank, Trustee

and Successor Trustee, respectively, of Trust Agreement known as

Trust No. 647.

"2. That the agreement as set out in paragraph 2 of Count I of plaintiff's First Amended Complaint at Law is a true photostatic copy of the aforementioned agreement.

"3. That Lot 27 at the date of the contract was and still is vacant property and at no time has been occupied or used by the plaintiff.

"4. That the following 'Notice' was received by Addie Mourant on June 10, 1938 by registered mail:-

"NOTICE.

"You are hereby notified that there is an unpaid balance of principal of \$1,019.97 which is long last due, payable and owing by you to the undersigned under and in accordance with the terms of a contract dated January 2, 1926, made between you and the undersigned, relative to the purchase by you of Lot 27 in Calumet Park View Sub-division, according to the plat thereof, together with interest to be computed as in said contract provided from July 2, 1926, and certain moneys advanced by the undersigned for general taxes and special assessments and interest on said advances.

"The undersigned hereby tenders to you a deed conveying said real estate, together with a guarantee of title, subject to the terms of said contract and on condition that you pay all of the above mentioned indebtedness to the undersigned within thirty days from the date hereof.

"You are hereby notified and warned that if you fail to pay said entire indebtedness within thirty days from the date hereof, the undersigned will show you no further indulgence, and that the undersigned insists on a strict compliance by you with the literal and strict terms of said contract, and if said entire indebtedness is not paid within thirty days from the date hereof, the undersigned intends to forfeit all your right, title and interest in and to said contract and in and to the real estate therein described.



Trust No. 647.

"2. That the agreement as set out in paragraph 2 of Count I of plaintiff's First Amended Complaint at law is a true photostatic copy of the aforementioned agreement.

"3. That Lot 27 at the date of the contract was and still is vacant property and at no time has been occupied or used by the plaintiff.

"4. That the following 'Notice' was received by Addie Mount on June 10, 1938 by registered mail:-

"NOTICE"

"You are hereby notified that there is an unpaid balance of principal of \$1,019.97 which is long last due, payable and owing by you to the undersigned under and in accordance with the terms of a contract dated January 2, 1926, made between you and the undersigned relative to the purchase by you of Lot 27 in Calumet Park View Sub-division, according to the plat thereof, together with interest to be computed as in said contract provided from July 2, 1926, and certain moneys advanced by the undersigned for general taxes and special assessments and interest on said advances.

"The undersigned hereby tenders to you a deed conveying said real estate, together with a guarantee of title, subject to the terms of said contract and on condition that you pay all of the above mentioned indebtedness to the undersigned within thirty days from the date hereof.

"You are hereby notified and warned that if you fail to pay said entire indebtedness within thirty days from the date hereof, the undersigned will show you no further indulgence, and that the undersigned insists on a strict compliance by you with the literal and strict terms of said contract, and if said entire indebtedness is not paid within thirty days from the date hereof, the undersigned intends to forfeit all your right, title and interest in and to said contract and in and to the real estate therein described.

"You are hereby advised that the undersigned is the Calumet Park View Trustee mentioned in said contract.

"Yours very truly,  
"The Pullman Trust & Savings Bank  
as Trustee under Trust Agreement  
known as Trust No. 647,  
"By Paul E. Pearson,  
"Vice President.

"5. That the following 'Declaration of Forfeiture' was received by Addie Mourant on July 16, 1938 by registered mail:

"DECLARATION OF FORFEITURE.

"Following up warning notice dated June 10, 1938, heretofore sent you, you are hereby notified that under the terms of a certain contract for the sale of the following described real estate, to-wit: Lot Twenty-seven in Calumet Park View Subdivision, according to the plat thereof, in Cook County, Illinois, which contract was dated January 2, 1926, and was made between The Pullman Trust and Savings Bank as Trustee under Trust Agreement known as Trust No. 647, as Seller, and Addie Mourant, as Purchaser, the undersigned agreed to convey, or cause to be conveyed, to you, by special warranty deed, the real estate hereinbefore described, subject to the matters and things in said contract set forth, provided, however, that the payments were made by you and the covenants, agreements and obligations performed on your part, as therein stated.

"Said contract further provided, among other things, that you were to pay the sum of One Thousand Five Hundred Dollars for said real estate as follows: Three Hundred Seventy-five Dollars at the signing and delivery of said contract and the balance of One Thousand One Hundred Twenty-five Dollars in quarterly installments of Sixty-nine Dollars or more, including interest on all sums at any time unpaid at the rate of six per cent. per annum till due, and thereafter at the rate of seven per cent. per annum till paid, payable monthly until said principal sum is fully paid.

"Said contract further provided, among other things, that

"You are hereby advised that the undersigned is the

Calumet Park View Trustee mentioned in said contract.

"Yours very truly,  
"The Pullman Trust & Savings Bank  
as Trustee under Trust Agreement  
known as Trust No. 647,  
"By Paul E. Pearson,  
"Vice President.

"That the following 'Declaration of Forfeiture' was re-

ceived by Addie Mountant on July 16, 1938 by registered mail:

"DECLARATION OF FORFEITURE"

"Following up warning notice dated June 10, 1938, heretofore

sent you, you are hereby notified that under the terms of a certain

contract for the sale of the following described real estate, to-wit:

Lot Twenty-seven in Calumet Park View Subdivision, according to the

plat thereof, in Cook County, Illinois, which contract was dated

January 2, 1926, and was made between The Pullman Trust and Savings

Bank as Trustee under Trust Agreement known as Trust No. 647, as

Seller, and Addie Mountant, as Purchaser, the undersigned agreed to

convey, or cause to be conveyed, to you, by special warranty deed,

the real estate heretofore described, subject to the matters and

things in said contract set forth, provided, however, that the pay-

ments were made by you and the covenants, agreements and obligations

performed on your part, as therein stated.

"Said contract further provided, among other things, that you

were to pay the sum of One Thousand Five Hundred Dollars for said

real estate as follows: Three Hundred Seventy-five Dollars at the

signing and delivery of said contract and the balance of One

Thousand One Hundred Twenty-five Dollars in quarterly installments

of Sixty-nine Dollars or more, including interest on all sums at

any time unpaid at the rate of six per cent. per annum till due,

and thereafter at the rate of seven per cent. per annum till paid,

payable monthly until said principal sum is fully paid.

"Said contract further provided, among other things, that



you were to pay all regular taxes after the date thereof upon said lands, and to pay all special assessments levied at any time thereon.

"The undersigned, which is the Calumet Park View Trustee mentioned in said contract, DOES HEREBY FURTHER NOTIFY YOU that because of your failure to pay the balance of principal aggregating One Thousand Nineteen Dollars and Ninety-seven Cents in quarterly installments as provided in said contract, and because of your failure to pay interest thereon as provided in said contract, and because of your failure to pay certain regular taxes and certain installments of special assessments levied and assessed against said real estate as provided in said contract, the undersigned has elected to forfeit and determine said contract, and does hereby forfeit and determine said contract in accordance with the terms thereof, and does hereby forfeit and determine all your right, title and interest in and to said contract and in and to the real estate therein described.

"YOU ARE HEREBY FURTHER NOTIFIED that unless you permit the undersigned to take possession of said premises without further notice and without proceedings at law or in equity, as agreed by you in said contract, that a proceeding under the provisions of a Statute of the State of Illinois, entitled 'An Act in regard to Forcible Entry and Detainer', commonly known as Chapter 57 of Illinois Revised Statutes, 1937, State Bar Association Edition,

you were to pay all regular taxes after the date thereof upon said lands, and to pay all special assessments levied at any time thereon.

"The undersigned, which is the Calumet Park View

Trustee mentioned in said contract, DOES HEREBY FURTHER NOTIFY YOU that because of your failure to pay the balance of principal aggregating One Thousand Nineteen Dollars and Ninety-seven Cents in quarterly installments as provided in said contract, and because of your failure to pay interest thereon as provided in said contract, and because of your failure to pay certain regular taxes and certain installments of special assessments levied and assessed against said real estate as provided in said contract, the undersigned has elected to forfeit and determine said contract, and does hereby forfeit and determine said contract in accordance with the terms thereof, and does hereby forfeit and determine all your right, title and interest in and to said contract and in and to the real estate therein described.

"YOU ARE HEREBY FURTHER NOTIFIED that unless you permit the undersigned to take possession of said premises without further notice and without proceedings at law or in equity, as agreed by you in said contract, that a proceeding under the provisions of a statute of the State of Illinois, entitled 'An act in regard to forcible Entry and Detainer', commonly known as Chapter 57 of Illinois Revised Statutes, 1937, State Bar Association Edition,

will be instituted against you by the undersigned for the possession of the following described real estate and property, to-wit:

"Lot Twenty-seven in Calumet Park View Subdivision, according to the plat thereof, in Cook County, Illinois.

"The Pullman Trust and Savings Bank  
as Trustee under Trust Agreement  
known as Trust No. 647.  
"By Paul E. Pearson,  
"Vice President.

"6. That pursuant to a demand made on August 2, 1938 on The Pullman Trust & Savings Bank by said Addie Mourant for return of the money paid by her under the contract 'whether made in payment of principal, interest, taxes or special assessments, plus interest from the date of payment thereof', The Pullman Trust and Savings Bank, by its attorney and duly authorized agent, Wellington G. Brown, did refuse to return the same on the ground that 'under the forfeiture and other provisions of said contracts and the law applicable thereto' she was not entitled to the return of any money, and at all times since has refused to return the same.

"7. That on September 30, 1938, The Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 647, conveyed the premises the subject matter of the above contract, to Edward P. Gannon; that on September 30, 1938 the said Edward P. Gannon conveyed the said premises to Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 2805.

"8. That Trust Agreement No. 647 dated June 22, 1925 provided that said Trust Agreement should not be recorded; that no purchaser of real estate from the Trustee should 'be privileged to inquire into the terms of this trust'; that the interest of the beneficiaries 'and all parties claiming under by or through them are hereby declared and considered to be personal property'; that 'this trust, unless previously closed by the sale of all the real estate herein described, shall be closed in five years from the date hereof, and the Trustee shall convey any lots, the title to



will be instituted against you by the undersigned for the possession of the following described real estate and property, to-wit: "Lot Twenty-seven in Calumet Park View Subdivision, according to the plat thereof, in Cook County, Illinois."

"The Pullman Trust and Savings Bank as Trustee under Trust Agreement known as Trust No. 647, By Paul H. Pearson, Vice President."

"6. That pursuant to a demand made on August 2, 1938 on The Pullman Trust & Savings Bank by said Addie Mowant for return of the money paid by her under the contract, whether made in payment of principal, interest, taxes or special assessments, plus interest from the date of payment thereof, The Pullman Trust and Savings Bank, by its attorney and duly authorized agent, Wellington G. Brown, did refuse to return the same on the ground that 'under the forfeiture and other provisions of said contracts and the law applicable thereto' she was not entitled to the return of any money, and at all times since has refused to return the same."

"7. That on September 30, 1938, The Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 647, conveyed the premises the subject matter of the above contract to Edward P. Gannon; that on September 30, 1938 the said Edward P. Gannon conveyed the said premises to Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 2807."

"8. That Trust Agreement No. 647, dated June 22, 1925 provided that said Trust Agreement should not be recorded; that no purchaser of real estate from the Trustee should be privileged to inquire into the terms of this trust; that the interest of the beneficiaries and all parties claiming under by or through them are hereby declared and considered to be personal property; that this trust, unless previously closed by the sale of all the real estate herein described, shall be closed in five years from the date hereof, and the Trustee shall convey any lots, the title to

which it then holds, to the parties of the first part, their legal representatives or assigns, and make distribution of any money or other personal property then on hand, in trust, in the same manner as hereinbefore provided'

"9. That the contract is unenforceable because said contract is materially defective for lack of mutuality, because there is neither an individual or partnership, nor a corporation, against whom the purchaser could proceed to compel a conveyance, the purchaser being obligated to pay, but no one being obligated to convey, and therefore the plaintiff is entitled to the return of money paid plus interest from date of payment.

"10. \* \* \*

"11. That upon information and belief Pullman Trust & Savings Bank is successor, both individually and as Trustee, to The Pullman Trust & Savings Bank, and as such has possession and control of the assets of said bank.

"12. That there remains due and owing said Addie Mourant, from The Pullman Trust and Savings Bank and Pullman Trust & Savings Bank Five Hundred Twenty-Nine Dollars and Sixty Five Cents, or some other sum within the peculiar knowledge and possession of said defendants plus interest from the date of payment.

"Wherefore, the plaintiff, Addie Mourant, demands judgment against The Pullman Trust and Savings Bank an Illinois Corporation and Pullman Trust & Savings Bank, an Illinois corporation in the sum of Five Hundred Twenty Nine Dollars and Sixty Five Cents, or whatever other amount is found to be due and owing, plus interest from date of payment."

We have omitted paragraph 10 of the count for the reason that the trial court, upon motion of defendants, struck that paragraph for defects in substance.

From the well pleaded allegations of the second amended

which it then holds, to the parties of the first part, their legal representatives or assigns, and make distribution of any money or other personal property then on hand, in trust, in the same manner as hereinbefore provided;

"9. That the contract is unenforceable because said contract is materially defective for lack of mutuality, because there is neither an individual or partnership, nor a corporation, against whom the purchaser could proceed to compel a conveyance, the purchaser being obligated to pay, but no one being obligated to convey, and therefore the plaintiff is entitled to the return of money paid plus interest from date of payment.

"10. \* \* \*

"11. That upon information and belief Pullman Trust & Savings Bank is successor, both individually and as Trustee, to The Pullman Trust & Savings Bank, and as such has possession and control of the assets of said bank.

"12. That there remains due and owing said Addie Mount, from The Pullman Trust and Savings Bank and Pullman Trust & Savings Bank Five Hundred Twenty-Nine Dollars and Sixty Five Cents, or some other sum within the peculiar knowledge and possession of said defendants plus interest from the date of payment.

"Wherefore, the plaintiff, Addie Mount, demands judgment against The Pullman Trust and Savings Bank an Illinois Corporation and Pullman Trust & Savings Bank, an Illinois corporation in the sum of Five Hundred Twenty Nine Dollars and Sixty Five Cents, or whatever other amount is found to be due and owing, plus interest from date of payment."

We have omitted paragraph 10 of the Count for the reason

that the trial court, upon motion of defendants, struck that paragraph for defects in substance.

From the well pleaded allegations of the second amended



complaint it must be assumed that defendant, the vendor, was never in default, and was always willing, ready and able to perform; that plaintiff, the vendee, defaulted in payment of principal, interest and taxes for over ten years, and that because of such defaults defendant forfeited the contracts; that prior to the forfeiture defendant served plaintiff with a notice that if plaintiff did not pay the entire indebtedness within thirty days from the date of the notice, no further indulgence would be shown her and that forfeiture would follow; that plaintiff was thus given an opportunity to perform and to avoid a forfeiture, and that the declaration of forfeiture was not served upon plaintiff until thirty-six days after the warning letter of June 10, 1938; that plaintiff did nothing until over two weeks after the contracts had been forfeited, when she demanded the return of moneys that she had paid more than ten years before on account of the purchase price.

In our judgment, the principal contention urged by plaintiff is that the vendor was not granted the power to terminate the contract by its terms and that therefore there could be "no forfeiture of money paid. \* \* \* that forfeiture is a special right conferred by contract upon a vendor;" that defendant had the right under the written instrument to terminate the contract on default by the vendee; that defendant exercised that power but that it now has in its possession and control money which in equity and good conscience belongs to plaintiff, which she is entitled to receive. Defendant contends that "where the vendor forfeits a contract because of the default of the vendee in making payments, the vendee cannot recover back what he has paid, and this is the rule notwithstanding the contract does not provide that the vendor may retain the money paid in case of a forfeiture of the contract;" that "it is not necessary for the contract to contain any express provision for forfeiture or for termination of the contract in the event of the vendee's default. Such clauses in

complaint it must be assumed that defendant, the vendor, was never in a fault, and was always willing, ready and able to perform; that plaintiff, the vendee, defaulted in payment of principal, interest and taxes for over ten years, and that because of such default defendant forfeited the contracts; that prior to the forfeiture defendant served plaintiff with a notice that if plaintiff did not pay the entire indebtedness within thirty days from the date of the notice, no further indulgence would be shown her and that forfeiture would follow; that plaintiff was thus given an opportunity to perform and to avoid a forfeiture, and that the declaration of forfeiture was not served upon plaintiff until thirty-six days after the warning letter of June 10, 1938; that plaintiff did nothing until over two weeks after the contracts had been forfeited, when she demanded the return of moneys that she had paid more than ten years before on account of the purchase price.

In our judgment, the principal contention urged by plaintiff is that the vendor was not granted the power to terminate the contract by its terms and that therefore there could be "no forfeiture of money paid. \* \* \* that forfeiture is a special right conferred by contract upon a vendor;" that defendant had the right under the written instrument to terminate the contract on default by the vendee; that defendant exercised that power but that it now has in its possession and control money which in equity and good conscience belongs to plaintiff, which she is entitled to receive. Defendant contends that "where the vendor forfeits a contract because of the default of the vendee in making payments, the vendee cannot recover back what he has paid, and this is the rule notwithstanding the contract does not provide that the vendor may retain the money paid in case of a forfeiture of the contract;" that "it is not necessary for the contract to contain any express provision for forfeiture or for termination of the contract in the event of the vendee's default. Such clauses in



a contract are but declarations of what would have been the legal rights of the vendor without such provisions." In support of plaintiff's contention the following cases are cited: Murphy v. Lockwood, 21 Ill. 611; Wheeler v. Mather, 56 Ill. 241; Staley v. Murphy, 47 Ill. 241, and Seiders v. Henry, 347 Ill. 467. There is force in the contention of defendants that counsel for plaintiff, in his argument, assumes that there was a rescission by defendant, notwithstanding the fact that the complaint sets up a forfeiture by defendant. A rescission is a termination of a contract with restitution. Where a forfeiture is properly exercised it terminates a contract without restitution. The facts in Murphy v. Lockwood are entirely different from the facts in the instant case. There the Supreme court held that the vendor could not rescind the contract without himself complying with the stipulations contained therein, and that the vendor's ground for rescinding failed. In Wheeler v. Mather the court treated the case of Murphy v. Lockwood as one in which the vendor sought to rescind the contract. Staley v. Murphy was an ejectment suit, and the court held, following Murphy v. Lockwood, that "the ordinary rule is, that a party rescinding a contract must place the other party in statu quo." Wheeler v. Mather, a later case than the last two mentioned, not only does not sustain plaintiff's position but sustains defendants' position. Defendants cite Wheeler v. Mather, *supra*; McLeod v. Sharp, 53 Ill. App. 406; Harlow v. Snow, 147 Ill. App. 369; Rea v. Security Trust & Savings Bank, (Cal. App.) 19 Pac. (2d) 267; Mintle v. Sylvester, 202 Iowa 1128, 1131-1134; Glock v. Howard & Wilson Colony Co., 43 L. R. A. 199, 204, and Utter v. Stuart, 30 Barbour (N. Y.) 20, 22. Wheeler v. Mather, the leading Illinois case upon the question before us, was before the court upon a rehearing and the opinion states (p. 244) that "it has received an extended and careful reconsideration." It involved an action of assumpsit, upon the common counts, brought by the purchaser of real estate to recover back money which he had



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 1128, 1131-1134; Glock v. Howard & Wilson Grocery Co., 43 N. H. 44,  
 Bank (Cal. App.) 19 Pac. (2d) 267; Wright v. Sylvester, 202 Iowa  
 Harlow v. Snow, 147 Ill. App. 369; See v. Security Trust & Savings  
 cite Wheeler v. Wether, supra; Wheeler v. Wether, 53 Ill. App. 466;  
 Plaintiff's position but sustains defendant's position. Defendants  
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 a contract without restitution. The facts in Murphy v. Lockwood are  
 restitution. Here a forfeiture is properly excluded if terminated  
 defendant. A rescission is a termination of a contract with  
 notwithstanding the fact that the complaint sets up a forfeiture by  
 in his argument, assumes that there was a rescission by defendant,  
 force in the contention of defendants that counsel for plaintiff,  
Murphy, 47 Ill. 241, and Seiders v. Henry, 347 Ill. 467. There is  
Lockwood, 21 Ill. 611; Wheeler v. Wether, 56 Ill. 241; Staley v.  
 Plaintiff's contention the following cases are cited: Murphy v.  
 rights of the vendor without such provisions." In support of  
 a contract are but declarations of what would have been the legal

paid the vendor. The opinion states (pp. 245-249): "The appellee, plaintiff below, was the only witness on his behalf. He introduced in evidence articles of agreement under seal, bearing date April 1, 1861, whereby appellant, as party of the first part, in consideration of the prompt payment of the money to be paid by appellee, agreed to sell appellee lands therein described, subject to a mortgage, appellee covenanting to pay for them \$1,892 as follows: \$550 cash at the time of making the contract, \$550 on the 1st day of June, A. D. 1861, and the balance, \$792, on the 1st day of April, 1862. Time was made of the essence of the contract. Appellant covenanted that, on the payment of the principal and interest as specified, he would, without delay, convey all his right, title and interest in the premises by deed with full covenants of warranty. The articles contained the proviso that they were upon the express condition that, in case of failure of the party of the second part (appellee) in the performance of all or either of the covenants on his part to be performed, the party of the first part (appellant) should have the right to declare the contract void, and take immediate possession of the premises.

"Appellee then produced in evidence a notice signed by appellant, dated August 2, 1862, and served on him about that time, which, after describing the contract, and reciting appellee's failure in making his payments, notified him that appellant declared the contract void and terminated.

"From his own testimony, it appears that appellee had paid only part of the installment of \$550 due June 1, A. D. 1861, and no part of that of \$792, due April 1, 1862. Nor did he offer any excuse for such default, or claim that there was any fraud or default on the part of appellant, but says he never demanded any deed from him. \* \* \*

"\* \* \* There is no theory upon which this action can be sustained, if at all, except that of an implied promise.

"If appellant had violated the contract, or it had been



-2-

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 no part of that of \$750, due April 1, 1862. Nor did he offer any  
 only part of the installment of \$750 due June 1, A. D. 1861, and  
 "From his own testimony, it appears that appellee had paid  
 contract void and terminated.

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 appellant, dated August 2, 1862, and served on him about that time,  
 "Appellee then produced in evidence a notice signed by  
 the contract void, and take immediate possession of the premises.

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 of all or either of the covenants on his part to be performed, the  
 failure of the party of the second part (appellee) in the performance  
 proviso that they were upon the express condition that, in case of  
 deed with full covenants of warranty. The articles contained the  
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 covenanting to pay for them \$1,892 as follows: \$750 cash at the time  
 sell appellee lands therein described, subject to a mortgage, appellee  
 of the prompt payment of the money to be paid by appellee, agreed to  
 1861, whereby appellant, as party of the first part, in consideration  
 in evidence articles of agreement under seal, bearing date April 1,  
 plaintiff below, was the only witness on his behalf. He introduced  
 paid the vendor. The opinion states (pp. 247-249): "The appellee,



rescinded by mutual consent, then the law would imply a promise on his part to pay back the consideration received. Paxon v. Mansfield, 2 Mass. 147; Seymour v. Bennet, 14 id. 266.

"But this contract was not rescinded by mutual consent. Appellee violated it, and then, as a consequence, appellant declared it terminated; and it was no breach of the contract on his part to do so. In Battle v. The Rochester City Bank, 3 Comst. 88, where the contract contained a similar provision and the right was exercised, the court said: 'The rescission of the contract in question by the bank was not a breach of it, but was in pursuance of a provision contained in it; and the defendants are chargeable with no violation of it whatever.'

"We believe it to be a sound principle, supported alike by reason, authority and good morals, that no man can make his own infraction of his agreement the basis of an implied undertaking in his favor, or of an action for money had and received against the other party who stands fair and innocent. It was upon this principle that the right of recovery was denied in the case of Ketchum v. Evertson, 13 Johns. 359, cited in the original opinion in this case. 'It would,' said the court, 'be an alarming doctrine, to hold that the plaintiffs might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the <sup>same</sup> right to recover it back that the plaintiffs have.'

"In Green v. Green, 9 Cow. 47, Chief Justice Savage reviewed all the former cases in New York on the subject, and closes his review by saying: 'I forbear the citation of more cases. I have found none of a recovery, where the party wishing to consider the contract rescinded has not shown a breach of the contract on the other side, or what was equal to it.'

rescinded by mutual consent, then the law would imply a promise on his part to pay back the consideration received. Paxon v. Mansfield, 2 Mass. 147; Raymond v. Bennett, 14 id. 266.

"But this contract was not rescinded by mutual consent. Appellee violated it, and then, as a consequence, appellant declared it terminated; and it was no breach of the contract on his part to do so. In Battle v. The Rochester City Bank, 3 Comst. 88, where the contract contained a similar provision and the right was exercised, the court said: 'The rescission of the contract in question by the bank was not a breach of it, but was in pursuance of a provision contained in it; and the defendants are chargeable with no violation of it whatever.'

"We believe it to be a sound principle, supported alike by reason, authority and good morals, that no man can make his own infraction of his agreement the basis of an implied undertaking in his favor, or of an action for money had and received against the other party who stands fair and innocent. It was upon this principle that the right of recovery was denied in the case of Johnson v. Everett, 13 Johns. 379, cited in the original opinion in this case. 'It would,' said the court, 'be an alarming doctrine, to hold that the plaintiffs might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the right to recover it back that the plaintiffs have.'

"In Green v. Green, 9 Cow. 47, Chief Justice Savage reviewed all the former cases in New York on the subject, and closes his review by saying: 'I forbear the citation of more cases. I have found none of a recovery, where the party wishing to consider the contract rescinded has not shown a breach of the contract on the other side, or what was equal to it.'



"The case of Battle v. The Rochester City Bank, 5 Barb. 414, involved the precise question in the case at bar. The contract contained the proviso that the vendors might declare it void for default of the vendee in making his payments. Default was made, the right was exercised, and the vendee sued to recover back what he had paid. Wells, Justice, who delivered the opinion of the court (and it was afterward affirmed by the court of appeals, 3 Comst., supra), said, 'in the case at bar it is not pretended that the defendants have not fulfilled to the letter every part of the agreement on their part to be fulfilled, and the plaintiff, by his counsel in his opening, admits that he neglected to pay the first of the annual installments mentioned in the contract. I confess myself entirely unable to find, in any elementary treatise or reported case, a principle recognized, which would allow the plaintiff to recover.'

"Stark v. Parker, 2 Pick. 267, is a case where the plaintiff had agreed to work for the defendant a year for \$120; worked part of the time, then quit without any fault on the part of defendant, and sued upon a quantum meruit for what he had done. Lincoln, Justice, in delivering the opinion of the court, uses this language: 'Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it.'

"Rounds v. Baxter, 4 Greenlf. 454, is very similar in its facts to the case of Ketchum v. Evertson, supra, and the court there said: 'The failure in the article of performance, then, was owing to the plaintiff's own fault, negligence or inattention, and we are to decide whether the law, in such circumstances, will furnish him an indemnity against the consequences of this fault, negligence or inattention. It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own



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"Donalds v. Wexler, 4 Greenliff, 474, is very similar in its facts to the case of Ketchum v. Newton, supra, and the court there said: 'The failure in the article of performance, then, was owing to the plaintiff's own fault, negligence or inattention, and we are to decide whether the law, in such circumstances, will furnish him an indemnity against the consequences of this fault, negligence or inattention. It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own

wrong or neglect. The principle is founded in the highest reason. The defendant never made an express promise to repay the money in question, and why should the law imply one in favor of a man who has violated his contract on the part of one who stands fair and innocent? If a man gives his neighbor \$100 he can not by law recover it back; no promise of re-payment is implied, and when the plaintiff concluded not to perform his contract, but abandon it, we must consider him as waiving all claim to what he had paid, as much as if he had given it without any pretense of consideration received.'

"In the case of Mansbrough v. Peck, in the supreme court of the United States, the contract contained a similar power, and also a clause authorizing the vendor to retain such purchase money as had been paid. The court, however, does not place the decision upon that ground; because, that being a case in chancery, such a clause, if it operated as mere forfeiture, would receive but little countenance from a court of equity. But recognizing the rule as laid down in Ketchum v. Evertson, supra, the court said, 'and no rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has been advanced or done.' 5 Wall."

The court concludes (pp. 250, 251): "There is no question as to the general principle that where the parties have not themselves prescribed the right of rescission and the circumstances under which it may be exercised, restoration must be made. All of the other cases cited by appellee's counsel are of this latter class. And none of them tend to support the position that a vendee shall be permitted in a court of justice to obtain indemnity against the consequences of his own mere default.



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"From the authorities above cited, and others of like weight and respectability, we may deduce these rules: Where the vendee enters upon the performance of such a contract, and, paying part of the purchase money, makes default which is inexcusable, and the vendor, being without fault, exercises the right given by the contract of declaring the same terminated, and in so doing acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid. But a vendor, who is himself in fault, for fraud or violation of his contract, can not exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase money received, and the equitable action for money had and received lie to recover it.

"We do not, however, hold, or mean to be understood as holding, that these rules cover the entire subject matter. There may be cases where a vendee, chargeable with a technical default under such a contract, might, under particular circumstances, be entitled to other relief, as in a case where he had paid a large portion of the purchase money, made valuable improvements upon the property, and his default was the result of fraud, accident or mistake; or the vendor should attempt to exercise the power of forfeiture in a case not fairly within its scope; or unfairly and oppressively, with the view of taking an undue advantage of the vendee by a forfeiture of payments and improvements; and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such court to restrain the act of the vendor, if about to be done, or, if accomplished, to set it aside, and to have the equities of the parties arising from their relations adjusted according to the circumstances of each case.

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"The case at bar presents no grounds for the action for money had and received, or relief in equity, within any of the



above rules. The judgment of the court below must therefore be reversed and the cause remanded."

Wheeler v. Mather has not been, to our knowledge, overruled or modified, and it has been cited with approval in a number of cases.

Plaintiff also cites Seiders v. Henry, supra. That case was before this court (259 Ill. App. 427, 429), and it appears from the opinion of this court that the trial court held (p. 429): "that where a party has advanced money, or done any other act in part performance of any agreement, and then refuses to proceed to carry out the other terms of the agreement, the other party being ready and willing to fulfill all the obligations imposed upon him by such agreement, he cannot recover back the money thus advanced, nor recover damages for any acts done by him in pursuance of said agreement." This court, speaking through Mr. Presiding Justice Matchett, decided that the trial court held correctly, and cited Wheeler v. Mather, supra; Bryson v. Crawford, 68 Ill. 362; Harlow v. Snow, 147 Ill. App. 369, and Hansbrough v. Peck, 5 Wall. 497, as a few of the cases which supported their decision. The judgment in favor of defendant entered by this court was reversed by the Supreme court, but upon the ground (347 Ill. 467, 472) that "the contract by its indefinite terms required further agreements between the parties before it became of binding force upon either, and their subsequent efforts in this direction failed."

In Harlow v. Snow, supra, the court said (p. 376): "It has been decided in Illinois that installments of purchase money paid on contracts of purchase cannot be recovered back on a forfeiture of the contract by its terms through the fault of the vendee, even where the contract does not specifically provide that they may be retained; a fortiori they cannot when it does so provide. Wheeler v. Mather, 56 Ill. 241; Whitaker v. Robinson, 65 Ill. 411; Bryson v. Crawford, 68 Ill. 366."



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In Rea v. Security Trust & Savings Bank, supra, the court said (p. 269): "But the right of the seller to retain the amount of payments which had been made is independent of any express clause in the contract for the forfeiture of rights or the retention of payments as liquidated damages; such clauses being but declarations of what would have been the legal rights of the vendor without such provisions."

In Glock v. Howard & Wilson Colony Co., supra, the court said (p. 204): "When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money. Thus, in Hansbrough v. Peck, 5 Wall. 497, 18 L. ed. 520, the Supreme Court of the United States, having under consideration this identical question, says: 'No rule in respect to the contract is better settled than this: that the party who has advanced money or done an act in part performance of the agreement and then stops short, and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.' In precise illustration of the proposition may be quoted the language of the learned Chancellor Walworth in Edgerton v. Peckham, 11 Paige, 352: 'The contract, it is true, contains a general provision that, if default shall be made in either of the payments, Strobeck shall forfeit all the previous payments, and give up the possession of the premises. This, however, is but the legal effect of the contract without such a provision; for,



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if no such provision had been contained in the agreement, the defendant might have brought an action of ejectment to recover the possession of the premises, which ejectment suit this court would not have restrained, except upon the terms of paying the balance of the purchase money and the costs of suit. Nor could the payments already made pursuant to the terms of the contract have been recovered back if the vendee had refused to complete his purchase, even if this clause of forfeiture had not been inserted in the contract. \*\*\* \*!"

In Mintle v. Sylvester, supra, the court said (p. 1132):

"An express stipulation for forfeiture of payments on default of the vendee is not a prerequisite to the right of the vendor on a default to retain the money paid and reinvest himself with possession of the land. Downey v. Riggs, 102 Iowa 88; Mail & Times Publishing Co. v. Marks, 125 Iowa 622; Richards v. Hellen & Son, 153 Iowa 66, 74; Mohler v. Guest Piano Co., 186 Iowa 161; Hansbrough v. Peck, 5 Wall. (U. S.) 497; Glock v. Howard & Wilson Colony Co., 125 Cal. 1 (55 Pac. 713, 43 L. R. A. 199, 69 Am. St. 17); Edgerton v. Peckham, 11 Paige's Ch. (N. Y.) 352; Francis v. Shrader, 38 Cal. App. 592 (177 Pac. 168); Oursler v. Thacher, 152 Cal. 739 (93 Pac. 1007). See, also, Harrington v. Eggen, 51 N. D. 87 (199 N. W. 447); Matteson v. United States & C. Land Co., 103 Minn. 407 (115 N. W. 195); Engel v. Mahlen, 153 Minn. 1 (189 N. W. 422)."

See, also, Utter v. Stuart, supra, p. 22.

We conclude that the instant contention of plaintiff cannot be sustained and that the contentions of defendants are supported by the facts set up in the pleadings and the law. In this connection it will be noted that defendants did not seek to take an undue advantage of plaintiff by the forfeiture and that the complaint does not make out a case that would have entitled plaintiff to relief even in an equitable proceeding. She is in the position of a vendee who violates her contract and seeks to make that

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violation the basis for the return of the money she has paid upon the contract.

If this were a case where plaintiff was attempting to rescind the contract and to recover the payments made on account of the purchase price she would have to show that she was not in default herself, that defendants were in default, and she would have to offer to pay the entire purchase money. (See Foster v. Jared, 12 Ill. 451, 454, 455; Davison v. Hill, 1 App. 70, 74; Eames v. Der Germania Turn Verein, 8 Ill. App. 663, 673-676.) But as we have heretofore stated, the allegations of the complaint would not support a theory of rescission.

Plaintiff very briefly contends that the trial court erred in carrying back plaintiff's motion to strike an answer to the complaint because there was an answer on file. It is sufficient to say, in answer to this contention, that a demurrer may be carried back even after a demurrer has been overruled and the defendant has pleaded over, when the declaration does not set out a cause of action on which a judgment can be sustained. (See People v. City of Spring Valley, 129 Ill. 169.) In the instant case, plaintiff stood by the second amended complaint and if we are right in holding, as we do, that the second amended complaint does not set up a cause of action, proceeding with a trial upon the said complaint would have availed plaintiff nothing. Defendants' counsel asserts in their brief that plaintiff's counsel consented to have the motion to strike the answer carried back to the second amended complaint and told the trial judge that he would be glad to have a decision on the question whether the second amended complaint stated a cause of action. This statement of defendants' counsel is not denied in the reply brief of plaintiff.

Several other contentions raised by plaintiff have been considered and found without merit.

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Several other contentions raised by plaintiff have been considered and found without merit.

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and there is not a trace of unfairness in their conduct toward plaintiff.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

and there is not a trace of unfairness in their conduct towards

plaintiff.

The judgment of the Circuit court of Cook county is

affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, Pl., versus



41845

EUGENE MOURANT,  
Appellee and Cross-Appellant,

44  
APPEAL FROM THE MUNICIPAL  
COURT OF CHICAGO.

THE FULLMAN TRUST & SAVINGS BANK,  
an Illinois Corporation,  
Appellant and Cross-Appellee.

314 I.A. 567<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action at law to recover certain payments made on a contract for the purchase of certain real estate, on the ground that at the time of the execution of the contract and the making of the payments the plaintiff was an infant. The case was tried by the court without a jury and there was a finding and judgment in favor of plaintiff and against defendant for \$556.67. Defendant appeals.

On February 15, 1926, plaintiff, through his mother, Addie Mourant, as he alleges in his statement of claim, entered into a contract with defendant to purchase a certain lot. The purchase price was \$1,400, payable as follows: \$350 at the time of the signing of the contract and the balance in quarterly installments of \$66 or more, with interest at six per cent per annum on the amount of principal remaining from time to time unpaid. The vendee also agreed to pay all regular taxes and special assessments levied on said lot after the date of the contract. Defendant, in its pleadings, denies that plaintiff entered into the contract and alleges that plaintiff's mother was either the sole party purchaser under the contract and had the sole interest therein or that she was a party jointly with plaintiff and had at least a one-half interest therein. The following are the only payments made on the contract: \$350 paid on the principal at the time of the signing of the contract, February 15, 1926; \$66 paid on September 8, 1926, of which amount \$50.50 was applied on account of principal, and \$15.50 on account of interest; \$6.69 paid on May 2, 1927, for general taxes for the year

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Defendant appeals.

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Applicant and Cross-Appellee.

THE CHICAGO TRUST & SAVINGS BANK,

Appellee and Cross-Appellant.

APPEAL FROM THE MUNICIPAL

COURT OF CHICAGO.

814 I.A. 567

41845



1926;<sup>and</sup> \$22.13 paid on November 8, 1928, for special assessments for water service and sewers. These payments were made by plaintiff's mother by checks drawn by her on her own personal checking account in the National Bank of Woodlawn. Plaintiff testified that his mother used his money in making all of the payments. Defendant claimed that it was the mother's money and not the plaintiff's that was used. The trial court found that plaintiff's mother made the contract for plaintiff and used his money in making the payments, and we see no good reason for disturbing that finding.

As plaintiff was born on September 22, 1908, he became of legal age on September 22, 1929. On April 11, 1929, defendant bank wrote plaintiff a letter, which he received, calling his attention to his defaults in making payments on the contract and demanding "that a substantial payment be made on this at once as this account has been long past due." On March 24, 1931, defendant wrote plaintiff another letter, received by him, in which the terms of the contract and the purchaser's defaults in payment of principal and interest are set forth fully and a demand is made for a substantial payment on the amount due. On June 29, 1931, defendant wrote plaintiff a letter, received by him, calling his attention to the fact that certain installments of certain special assessments were past due and requesting that he promptly pay the same. Plaintiff made no answer to these letters and took no action in reference thereto. On June 10, 1938, defendant served a demand for payment upon Eugene Mourant and Addie Mourant, which communication warned them "that if you fail to pay said entire indebtedness within thirty days from the date hereof, the undersigned will show you no further indulgence, and that the undersigned insists on a strict compliance by you with the literal and strict terms of said contract, and if said entire indebtedness is not paid within thirty days from the date hereof, the undersigned intends to forfeit all your right, title and interest in and to said contract and in and to the real estate therein described."



and 1926; \$22.13 paid on November 8, 1928, for special assessments for water service and sewers. These payments were made by plaintiff's mother by checks drawn by her on her own personal checking account in the National Bank of Woodlawn. Plaintiff testified that his mother used his money in making all of the payments. Defendant claimed that it was the mother's money and not the plaintiff's that was used. The trial court found that plaintiff's mother made the contract for plaintiff and used his money in making the payments, and we see no good reason for disturbing that finding.

As plaintiff was born on September 22, 1903, he became of legal age on September 22, 1929. On April 11, 1929, defendant bank wrote plaintiff a letter, which he received, calling his attention to his default in making payments on the contract and demanding "that a substantial payment be made on this at once as this account has been long past due." On March 24, 1931, defendant wrote plaintiff another letter, received by him, in which the terms of the contract and the purchaser's default in payment of principal and interest are set forth fully and a demand is made for a substantial payment on the amount due. On June 29, 1931, defendant wrote plaintiff a letter, received by him, calling his attention to the fact that certain installments of certain special assessments were past due and requesting that he promptly pay the same. Plaintiff made no answer to these letters and took no action in reference thereto. On June 10, 1938, defendant served a demand for payment upon Eugene Mount and Adelle Mount, which communication warned them "that if you fail to pay said entire indebtedness within thirty days from the date hereof, the undersigned will show you no further indulgence, and that the undersigned insists on a strict compliance by you with the literal and strict terms of said contract, and if said entire indebtedness is not paid within thirty days from the date hereof, the undersigned intends to forfeit all your right, title and interest in and to said contract and in and to the real estate therein ~~mentioned~~ and to said contract and in and to the real estate therein

described." On July 16, 1938, defendant served a declaration of forfeiture upon Eugene Mourant and Addie Mourant. On July 5, 1938, plaintiff served upon defendant a notice in which he "refuses to ratify said contract as regards any interest he may have thereunder, does repudiate and disaffirm said contract and all rights or liability thereunder on the ground that at the time the contract was entered into between the parties, he was an infant." Plaintiff testified that he "never did any act in disaffirmance of the contract prior to July 5, 1938." On August 2, 1938, plaintiff made a demand on defendant for the return of the moneys paid under the contract, and upon the refusal of defendant to return the said moneys he filed this suit, on May 1, 1939.

A number of grounds are urged by defendant in support of its contention that the judgment should be reversed. In our view of this appeal it is only necessary to consider one.

Defendant contends: (a) "If plaintiff [under the admitted facts] had been of legal age at the time of the execution of the contract, he could not get his alleged money back." (b) "An infant must disaffirm his contract within a reasonable time after he becomes of legal age and failing to do so, he loses his right of disaffirmance and is bound by the contract as though he had been an adult at the time of its execution." Contention (a) is a meritorious one. (See our decision filed this day in Mourant v. The Pullman Trust & Savings Bank et al., Gen. No. 41,784.) As to contention (b): Plaintiff admits by his pleading and his testimony that he did not disaffirm the contract until eight years, nine months and thirteen days after he became of legal age; that he did not file his suit until nine years, seven months and nine days after he became of legal age. No other reasonable conclusion can be drawn from the record in this case than that plaintiff, after he became of age, abandoned the contract, and that the claim made in the instant suit, filed after the declaration of forfeiture, was an



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afterthought. The only ground for disaffirmance set up in plaintiff's pleadings is that he was an infant at the time the contract and the payments were made.

In Swiney v. Womack, 343 Ill. 278, where it was sought to hold Womack liable on a deed, contract and notes executed when he was a minor, the court said (p. 287): "Contracts and notes made by infants are voidable and may be repudiated within a reasonable time after the infant reaches full age. (Rubin v. Strandberg, 288 Ill. 64; Wright v. Buchanan, 287 id. 468.)"

In Sayles v. Christie, 187 Ill. 420, the court said (p. 437):

"Conveyances, made by infants in person, are voidable only, to be confirmed or repudiated at their discretion after they arrive at years of minority. (Cole v. Pennoyer, 14 Ill. 158; Walker v. Ellis, 12 id. 470). A conveyance of real estate by a minor must be disaffirmed and repudiated by him within three years after his majority, or it will be upheld; that is to say, the time, within which an infant after reaching majority must revoke a conveyance made during minority, is the period of three years after arriving at such majority. A neglect or failure to disaffirm the deed within that time will be held to be a ratification of it. (Blankenship v. Stout, 25 Ill. 132; Keil v. Healey, *supra* [84 Ill. 104].)"

In Keil v. Healey, 84 Ill. 104, the court said (p. 107):

"The time within which an infant, after majority, should revoke a conveyance made during minority, can not be regarded an open question in this State. In Blankenship v. Stout, 25 Ill. 132, it was held, that a person who has conveyed lands during infancy, was bound to disaffirm the deed within three years after arriving at majority, and a neglect or failure to do so would be held to be a ratification of the conveyance. This rule was adopted from analogy to a section in the Limitation Law of 1839, which required one under disability to bring an action within three years after

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the disability was removed.

"The same rule was adopted in Cole v. Pennover, supra [14 Ill. 158], and we perceive no reason why it should be changed.

"If the infant has been imposed upon, and his lands obtained for less than an adequate consideration, certainly three years after he attains majority is time enough to determine that fact, and bring an action to recover the property."

Since the last two cases were decided the Legislature has shortened the period from three years to two years. (See par. 22, Limitations Act (Ill. Rev. Stat. 1941, ch. 83, par. 22, sec. 21.)

Chicago Telephone Co. v. Schulz, 121 Ill. App. 573, involved an action for personal injuries wherein the plaintiff had repudiated a release given during her minority within a year and four months after she attained her majority. The opinion states (pp. 582, 583):

"The plaintiff, May 2, 1899, when she was seventeen years and between two and three months of age, executed a release to the defendant. June 17, 1901, when she was nineteen years and four months of age, she, by letter to the defendant, disaffirmed the release. The court refused an instruction asked by defendant, to the effect that plaintiff did not repudiate the release within a reasonable time after attaining her majority. We are of opinion that the refusal of the instruction was proper. The Supreme Court, in Cole v. Pennover, 14 Ill. 158; Blankenship v. Stout, 25 id. 116; Rucker v. Dooley, 49 ib. 377, and Keil v. Healey, 84 ib., 104, have adopted the rule that an infant may avoid a deed of conveyance of land, made during minority, after attaining majority, within the time limited by the Statute of Limitations for bringing an action. We perceive no good reason why this rule should not apply equally to purely personal actions. The limitation in such cases as this is two years. Hurd's Statutes, 1903, p. 1207, sec. 14. The plaintiff repudiated the release within two years after she attained her



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majority, after which she brought suit June 20, 1901, also within the two years." (*Italics ours.*) The court, in that case, applied the limitation period of two years in determining the question as to whether plaintiff had repudiated the release within a reasonable time after attaining her majority.

In *Black on Rescission of Contracts and Cancellation of Written Instruments*, 2d Ed. (1929), Vol. 2, Sec. 537, the author states: "A person who was under a disability at the time he entered into a contract, and who has the right to rescind it, either on account of such disability or for other cause, is not chargeable with laches in failing to take steps for rescission while the disability still continues, but he must act with reasonable promptness after its removal. Thus, if a party to a contract was an infant at the time it was made, and the contract is of such a nature that he has the right to disaffirm it on account of his infancy, he must do so within a reasonable time after he attains his majority, and if he fails to do so, he will be held to have affirmed it."

In Burnet v. Chapin, 274 Ill. App. 186, this division of the court held that the infant had a reasonable time after he attained his majority to disaffirm the contract, and that his disaffirmance two months after he attained his majority was manifestly within the rule.

Plaintiff's counsel makes the strained argument that plaintiff had no cause of action until he disaffirmed on July 5, 1938, and that he had five years after that date in which to sue defendant. Plaintiff was nearly thirty years of age when he disaffirmed. If he could wait until he was thirty years of age before disaffirming and then have five years thereafter in which to commence suit, why could he not wait until he was forty or fifty years of age before he disaffirmed? He was called upon to speak one year, six months and two days after he became of age. He was again called upon to speak on June 29, 1931, one year, nine months and seven days after he became

majority, after which she brought suit June 20, 1901, also within the two years." (Italics ours.) The court, in that case, applied the limitation period of two years in determining the question as to whether plaintiff had repudiated the release within a reasonable time after attaining her majority.

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of age. Yet he did not speak or take any action upon either occasion.

In Wise v. Loeb, 15 Pa. Superior Ct. Reports, 601, the court, in holding a minor liable on a contract and judgment note executed during his minority, said (p. 604):

"The question as to the defendant's minority, when the contract, of which the note was evidence in part, was entered into, and his right to avoid it for that reason, was, we think, properly disposed of by the court below. 'When the infant attains majority and does not mean to stand by a contract made in infancy, his proper course is to disaffirm it by an act as solemn as that by which it was made; and ratification may be inferred from his failure to disaffirm within a reasonable time after coming of age, as well as from positive recognition of the contract'; 8 P. & L. Dig. of Dec. 13997. The defendant had an opportunity to be heard in disaffirmance of his contract, when he presented his petition to the court to have the judgment opened. It was his duty, when first called upon to speak, to disaffirm the contract, if he intended to avoid it by reason of his minority. His failure to do so must be regarded as an affirmance. It was too late to raise the question upon the trial."

We hold that plaintiff did not repudiate the contract within a reasonable period after he reached full age.

Plaintiff in this court seeks to raise the question of the Statute of Frauds, viz., that his mother had no written authority to sign his name to the contract. The right to invoke the Statute of Frauds was personal to plaintiff and he did not rely upon that right in the trial court. The statement of claim alleges that plaintiff, "by his mother, Addie Mourant, entered into a contract," etc., and he testified that he asked his mother to sign the contract and that she used his money in making the payments. Plaintiff, in his notice of disaffirmance, disaffirmed solely upon the ground of

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infancy. He cannot try his case upon one theory in the trial court and upon another theory in this court.

It is the rule in this State, as Stated in Swiney v. Womack, supra, that contracts and notes made by infants are voidable and may be repudiated within a reasonable time after the infant reaches full age. It is also true that in determining what is a reasonable time our courts have sometimes adopted the two years period in the Statute of Limitations even where the case did not involve the conveyance of land. But our courts have never held that "a reasonable time" may exceed the two years period of time prescribed by the said Statute for bringing an action. Nor have they ever held that the former infant can toll the Statute of Limitations by delaying his disaffirmance after he becomes of legal age. Plaintiff is bound by the contract; he has for many years failed to carry out his obligations under it, and the judgment of the Municipal court of Chicago entered January 27, 1941, is reversed in toto.

We have reversed the judgment of that date in toto for the reason that the trial court, in addition to entering judgment in favor of plaintiff and against defendant for \$556.67 also entered in the judgment order a judgment in favor of defendant and against plaintiff in the sum of \$17.50. Plaintiff has filed a cross-appeal as to the judgment against him and he has properly raised and argued the action of the trial court in entering said judgment. Defendant has not seen fit to answer plaintiff's argument as to the cross-appeal and we must conclude that defendant concedes that the entry of the judgment in its favor was unwarranted.

JUDGMENT ORDER ENTERED JANUARY  
27, 1941, REVERSED IN TOTO.

Sullivan and Friend, JJ., concur.



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We have reversed the judgment of that date in toto for the reason that the trial court, in addition to entering judgment in favor of plaintiff and against defendant for \$250.00 also entered in the judgment order a judgment in favor of defendant and against plaintiff in the sum of \$17.50. Plaintiff has filed a cross-appeal as to the judgment against him and he has properly raised and argued the action of the trial court in entering said judgment. Defendant has not seen fit to answer plaintiff's argument as to the cross-appeal and we must conclude that defendant conceded that the entry of the judgment in its favor was unwarranted.

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Sullivan and Friend, 13, corner.

41871

ANNA PIETROLONARDO,  
Appellee,

v.

JAY R. HOUGHTELING, HELEN  
HOUGHTELING and PIONEER  
TRUST & SAVINGS COMPANY, a  
corporation,  
Appellants.

45  
APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 568'

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Jay R. Houghteling and his wife, Helen, were owners of a two-story building on Fullerton avenue, Chicago, which was maintained and managed for them by the Pioneer Trust & Savings Bank. The building consisted of a store with an apartment above, which was occupied under a month-to-month tenancy by plaintiff's family, including her married son. Plaintiff fell and was injured on a stairway leading from the vacant store to the basement of the building. She brought suit against the Houghtelings as owners and the bank as manager of the premises, upon the theory that the stairway was common to all the tenants, but on trial she amended her complaint to the theory that she was an invitee in the use of the stairway, which was alleged to have been carelessly and negligently maintained in a dangerous and unsafe condition. Trial by jury resulted in a verdict and judgment against all defendants for \$7,500, from which they have taken this appeal.

The salient facts taken from a record embracing some 700 pages may be summarized as follows. The premises consist of a 25-foot frontage facing south on Fullerton avenue, improved with a brick building consisting of a basement, a store on the first floor and an apartment on the second floor. The entrance to the store is by a door in the center of the premises on Fullerton avenue and another door in the rear. Inside the store, about halfway between the front and rear and on the west side thereof, was a stairway used only by the occupants of the store for entering

ANNA PINTO LORADO

Appellee

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314 I.A. 568

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and leaving the basement. There is no stairway inside the building which gives the second-floor tenant access from the second floor to the basement. Access to the basement by the tenant of the apartment is through an outside stairway in the rear of the premises. An outside door at the west side of the front of the building leads through the hallway to the second floor, and a door just inside this doorway affords entrance into the store. In the rear of the building, in addition to the basement stairway which is outside, there is also an outside stairway leading to the back porch of the second-floor apartment, which is intended for the use of the second-floor tenant only.

November 27, 1937 both the store and the apartment were vacant. On that day plaintiff's son Frank Pietrolonardo, on behalf of his father and mother, made inquiry at the bank with respect to leasing the apartment. He talked to Mr. Edward J. Kucera, secretary of the bank, who told him the rent would be \$30 a month and gave him the keys so that he might inspect the premises with his mother and his wife. On the tour of inspection he attempted to gain access to the basement from the rear, where he found a wooden and also a steel door. He testified that he opened the wooden door but found the steel door frozen to the ground. Returning to the bank, he had further conversation with Kucera and testified that he told him, "I am not going to use the back stairway the way it is now. If you will let us use the front stairway, make some kind of agreement about that, I will take it, otherwise I won't," to which Kucera is said to have replied, "I will give you keys of the store and if anybody should come over here I will send them over there and you show them the store." After further surveying the premises Frank complained about the back stairway, saying there were four or five inches of ice there, that the back basement door could not be opened because it was frozen from the outside, and that

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November 27, 1937 both the store and the apartment were vacant. On that day plaintiff's son Frank Piatolomardo, on behalf of his father and mother, made inquiry at the bank with respect to leasing the apartment. He talked to Mr. Edward J. Kucera, secretary of the bank, who told him the rent would be \$30 a month and gave him the keys so that he might inspect the premises with his mother and his wife. On the tour of inspection he attempted to gain access to the basement from the rear, where he found a wooden door and also a steel door. He testified that he opened the wooden door but found the steel door frozen to the ground. Returning to the bank, he had further conversation with Kucera and testified that he told him, "I am not going to use the back stairway the way it is now. If you will let us use the front stairway, make some kind of agreement about that, I will take it, otherwise I won't," to which Kucera is said to have replied, "I will give you keys of the store and if anybody should come over here I will send them over there and you show them the store." After further surveying the premises Frank complained about the back stairway, saying there were four or five inches of ice there, that the back basement door could not be opened because it was frozen from the outside, and that



he then made an agreement with Kucera by which plaintiff's family could use the stairway leading from the store to the basement, so long as the store remained vacant, with the understanding that as soon as the store was leased, he and his family would probably move out.

The Pietrolonardo family moved into the apartment December 10, 1937. Plaintiff testified that December 24 a man, whose name is not disclosed by the evidence and whose description is only vaguely given, rang the door bell and said that he had been sent there by the bank as a prospective tenant of the store. Plaintiff, who spoke very little English and testified through an interpreter, thereupon called her son, who was in the bathroom, and he asked her to show the store, which she proceeded to do. After viewing the premises, this man asked to see the basement. Plaintiff's family had been using the basement to wash their clothes and to store some of their personal effects. The day before she had washed some clothes, and her testimony was to the effect that she intended going to the basement with the prospective tenant for the dual purpose of showing him the basement and gathering the clothes which she had hung there the day before. She opened the door to the basement, put her hand against the wall and turned on the light as she started downstairs. The defect in the stairway of which she complains was a structural defect which had been in the same condition since the building was erected. The subflooring of the store projected about an inch and one-half farther than the hardwood flooring. The light in the basement cast only scant illumination on the landing, and as plaintiff was about to descend the stairway through the door from the store, her heel caught on this subflooring projection and she fell down the stairs and fractured her arm. She testified that the man whose name was not given or asked assisted in carrying her upstairs. The accident was not reported to any of defendants until April 1938 some four months later, when Kucera



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came to the apartment to serve a five-day notice on plaintiff's family for failure to pay rent. He observed plaintiff's arm in a sling and she then told him that she had fallen on the basement stairway. The Pietrolonardo family vacated the premises about three months thereafter.

Among the various reasons urged for reversal, defendants contend that the manifest weight of the evidence is in their favor on all questions at issue and that the court should have directed a verdict in their favor. The original complaint proceeded on the theory that this was a stairway used in common by the tenants and the public. On hearing of the motion for a new trial, plaintiff had leave to amend her complaint on its face by inserting the words "at the invitation of the defendants and each of them," thus predicated her right to recovery on the theory that she was an invitee and abandoning the common stairway theory. Defendants argue that the original complaint clearly shows that the pleader had not been told about any agreement for use by plaintiff's family of the stairway leading from the store because of any lease or agreement made with Frank at the time of the leasing, and that the pleader had in mind only that there was a common stairway for the use of all tenants and the public in general, and they say that the amendment, made so late in the proceeding, constitutes an admission "that the story and the theory were changed between the date of the drafting of the complaint and the trial," and was necessitated by the fact that the theory of the original complaint could not be sustained by the evidence adduced upon the trial. It appears from the record that in December 1938 defendants sent an investigator and a court reporter to ascertain how plaintiff had been injured, and counsel say that in an inquiry, in which the whole Pietrolonardo family participated, the questions propounded and the answers made indicated that plaintiff had gone into the basement to fire the furnace; that her son who was upstairs when she fell heard her cry out and carried



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her upstairs, and defendants argue that the story about the prospective tenant is fictitious and that plaintiff was not injured in the manner or under the circumstances to which she testified. As further support of this contention it is urged that no report of the accident was made to defendants until four months later, when notice was served upon them for failure to pay rent; that they moved from the premises in the early hours of the morning in July of 1938 and instituted suit shortly thereafter.

Defendants take the position that plaintiff was either a trespasser or a licensee, to whom they owed no such duty as is required to be accorded an invitee. They were justified in trying the case on that theory. After a careful examination of the evidence we have reached the conclusion that the verdict is contrary to the manifest weight of the evidence upon the newly adopted theory under which plaintiff now seeks to justify the verdict. Because the cause may have to be retried, we refrain from commenting extensively on the evidence.

The judgment of the Circuit court is accordingly reversed and the cause remanded for retrial.

JUDGMENT REVERSED AND CAUSE  
REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

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JUDGMENT REVERSED AND CAUSE  
REMANDED.

SEANLAN, P. J., and SULLIVAN, J., concur.

41891

EDWIN HAMILTON,  
Appellee,

v.

THOMAS J. GRADY and  
WILEY W. MILLS, trustee,  
etc.,  
Appellants.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 568<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff originally sued in assumpsit on a written contract for attorney's fees previously accrued, with an additional claim under common counts for subsequent services which were reduced to judgment and are not herein questioned. On the written contract defendant Grady had judgment, which was reversed on appeal and remanded for retrial, with the suggestion that the cause be transferred to the chancery side under amended pleadings to be filed (case No. 38285, not published). The cause was redocketed, transferred as suggested in our opinion, an amended and supplemental answer was filed by defendants attacking the contract for fraud and duress, and a counterclaim was also filed on like grounds asking the return of certain notes, mortgages and documents upon which plaintiff based his claim. The matter was referred to a master who, after an extended hearing embracing a voluminous record, found that the aggregate charge in excess of \$17,000 made by plaintiff for services rendered was not excessive or unreasonable and recommended that defendant Grady's counterclaim be dismissed for want of equity. In the course of the litigation an involuntary petition in bankruptcy was filed against Grady in 1935, and his trustee, Wiley W. Mills, had leave to join in the proceeding. This appeal is prosecuted by Grady and Mills, as trustee, to review the decree entered by the chancellor pursuant to the master's recommendations.

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answer was filed by defendants attacking the contract for fraud

transferred as suggested in my opinion, an amended and supplemental

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MR. JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

Appellants.

THOMAS J. GRADY and  
WILEY W. MILLS, Trustees,  
etc.,

v.

EDWIN HAMILTON,  
Appellee.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

3141 A. 568

is sharply conflicting, there is no dispute as to certain salient facts. Hamilton, an attorney at law, was first retained by the defendant Grady October 1, 1930 to represent him in divorce proceedings then pending in the Superior court. The cause was determined adversely to Grady and the decree was affirmed by the Appellate court. Hamilton also claims to have served Grady in other matters, including an equity proceeding wherein one Regan sought to establish a partnership in one-half of valuable properties owned by Grady, but no proof was offered as to the time, amount or value of such services. There is evidence of record, most of which is denied by Grady, that Hamilton rendered statements of account on various dates between October 1, 1930 and September 21, 1931, and that letters passed between the parties wherein Grady acknowledged the receipt of bills for services and indicated that he would try to arrange for payment, at the same time criticizing the amount charged by Hamilton. The oral agreement for payment of fees to Hamilton, purported to have been made when he was first retained to represent Grady in the then pending divorce proceeding, is the subject of considerable conflict. Grady asserts that Hamilton then agreed to substitute for counsel of record and to assume sole charge of his interests for a fee not to exceed \$1,500. ~~Hamilton~~ Hamilton contends that they agreed upon a retainer of \$1,500 and also \$100 a day and \$15 or \$20 an hour for part time. The master's finding is contrary to both versions, sustaining Hamilton as to the retainer but finding that Grady promised to pay such further compensation "as would be reasonable." In any event, Grady failed or refused to pay the bills which Hamilton says he rendered from time to time, and the crisis in their relationship was reached in the fall of 1931. Before that time Grady had paid Hamilton \$3,027 in cash, which is admitted, and he testified that this was in full and that he never agreed to pay more.

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Hamilton testified that in 1931, after a decree had been entered against Grady in the divorce proceeding and affirmed by the Appellate court, he advised Grady that he would no longer represent him unless his bills were paid. Letters passed between the parties, culminating in two meetings between them shortly before the execution of the written agreement upon which Hamilton's suit is predicated. Hamilton had prepared the written agreement containing a settlement and account stated and an undertaking by Grady to guarantee payment of two mortgage notes, one executed by William M. Hickey in 1927 for \$9,000, payable in three years, owned and held by Grady, and one note for \$5,000 made by Grady, as trustee, on September 1, 1930, wherein he promised to pay to his own order, three years after date, the sum of \$5,000 with interest. These notes were turned over to Hamilton, and the settlement agreement, bearing date October 1, 1931, which is the principal subject of controversy between the parties, wherein Grady acknowledged an indebtedness to Hamilton for his services in the sum of \$13,959, was then presented to Grady for signature. The material portions of the agreement read:

"That in consideration of the mutual covenants and agreements herein contained to be kept and performed by each of the parties hereto the said parties agree to and with each other as follows:

"Party of the first part acknowledges himself to be indebted to party of second part in the sum of Thirteen Thousand Nine Hundred Fifty-Nine (\$13,959.00) Dollars for disbursements made and services rendered by the party of the second part for and on behalf of or at the request of party of first part prior to the first day of October, A. D. 1931, and in consideration thereof hereby assigns, sets over and transfers to the party of the second part two certain trust deeds conveying real estate in the City of Chicago, and notes

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secured thereby for the aggregate principal sum of Fourteen Thousand (\$14,000.00) Dollars, said trust deeds being recorded in the Recorders office of Cook County, Illinois, as documents Nos. 9874376 and 10769585 respectively. The party of the first part hereby guarantees the payment of said notes according to the terms and conditions thereof and according to the terms of the respective trust deeds securing same and shall not be released from this guarantee except by payment in cash.

"Party of the second part hereby settles the amount of the indebtedness from party of first part to the party of the second part in the sum of Thirteen Thousand Nine Hundred Fifty-Nine (\$13,959.00) Dollars and agrees to accept therefor said trust deeds and notes above mentioned according to the provisions hereof.

"It is further agreed that the party of the second part shall have full power and authority to sell, assign and deliver said Trust Deeds and notes, or any part thereof, at any time and in the event of such sale the party of the first part will pay the party of the second part any discount which the party of the second part may allow thereon not to exceed fifteen per cent."

Hamilton's case is predicated upon the theory that the mere introduction of his contract and of his notes and mortgages purporting to be assigned and guaranteed thereby entitles him to recovery without any showing of the amount or value of the legal services rendered by him, and, in fact, no such proof was offered. Defendants, on the other hand, contend that the services were fully paid for in cash, that the evidence affirmatively establishes that the contract and assignments were obtained by fraud and duress, that Hamilton being Grady's attorney at the time, it was incumbent on him affirmatively to show the fairness of the contract, the nature and extent of the services and the value thereof, and that Hamilton's refusal to disclose such facts precludes his recovery.



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These contentions lead to the principal question to be determined, namely, whether the relationship of attorney and client existed at or about the time the contract was made and what "pressure" or "duress" was exerted by Hamilton in inducing Grady to enter into the agreement. Upon this question there is considerable conflict in the evidence. Hamilton had carried on the divorce proceeding for Grady through decree and until after the decree was affirmed in the Appellate court. There was still time within which to apply for leave to appeal to the Supreme court of Illinois. The Regan case was also pending. Hamilton testified that he told Grady that "either he sign that guarantee or that I would have to part company with him and he would have to carry on his case alone," and Grady says that Hamilton demanded that he sign the contract before he would do anything further in the Regan case, and also that he threatened to turn over Grady's evidence, betray him to his adversary, and destroy him financially. Hamilton denies these charges. Aside from Grady's evidence and that of Hamilton, there is the latter's admission that he put "pressure" on Grady to sign the agreement.

Two other witnesses testified to circumstances which throw some light on the matter. One of these was Clara Berger, who performed stenographic and secretarial work for Grady from 1924 to 1935. She testified that she first met Hamilton in September 1931 in Grady's office; that she was familiar with the lawsuit wherein Regan was seeking to establish a partnership with Grady, and was present at a rather heated conversation between Grady and Hamilton September 30, 1931; that Hamilton came in with some papers in his pocket and went into Grady's office. Miss Berger remained in the reception room and she then heard Hamilton ask Grady to sign the papers. The conversation grew louder and louder, "and the first thing you know Mr. Grady was shouting about it and he said Mr.



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Hamilton was trying to take unfair advantage of him by asking him to sign an agreement like that, and Mr. Hamilton said something to the effect that, if he didn't agree to those terms that he would turn over information to the other side, meaning the people representing Regan. Mr. Grady got angry about that and said he would disbar him for it, and came out to the outer office and he asked me if I had heard what he had said, and I said, 'Yes,' She further testified that she heard no conversation with respect to attorney's fees, and denied having typed a letter purported to have been written by Grady in answer to Hamilton's demand for payment of his bills, which Grady testified that he had never signed or written, although the master found adversely to him on this phase of the case.

In further corroboration of his defense Grady produced an attorney, Henry N. Miller, who testified that he had represented Grady in several cases dating back over a period of ten years or more. In the course of that relationship he had contact with Hamilton in the early part of October 1931. He recalled the first hearing at which testimony was taken in the Regan case before Master Robert Dunn and fixed the date as September 29, 1931. Between that time and October 6 he had a conversation with Hamilton in his office wherein the latter told him that he had been over to see Grady and had asked him to sign some papers relating to fees for services but that Grady had refused to execute the agreement; that he had told Grady he "wanted that contract signed, and if he did not sign it, he would ruin his cases. \*\*\* In that conversation Hamilton said that he put the pressure on Grady very strong. He told me he got the papers signed by Grady." Whether actual duress was exerted upon Grady is a question upon which we need not express an opinion, but the testimony of these two witnesses corroborates Hamilton's admission that he put "pressure" upon Grady to get the contract signed and that he told him "either he sign that guarantee or \*\*\* I would have to part company with him and he would have to carry on his case alone."

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In further corroboration of his defense Grady produced an attorney, Henry A. Miller, who testified that he had represented Grady in several cases dating back over a period of ten years or more. In the course of that relationship he had contact with Hamilton in the early part of October 1931. He recalled the first hearing at which testimony was taken in the Regan case before Master Robert Dunn and fixed the date as September 29, 1931. Between that time and October 6 he had a conversation with Hamilton in his office wherein the latter told him that he had been over to see Grady and had asked him to sign some papers relating to fees for services but that Grady had refused to execute the agreement; that he had told Grady he "wanted that contract signed, and if he did not sign it, he would ruin his case." \*\*\* In that conversation Hamilton said that he put the pressure on Grady very strong. He told me he got the papers signed by Grady. "Neither actual duress was exerted upon Grady as a question upon which we need not express an opinion, but the testimony of these two witnesses corroborates Hamilton's admission that he put "pressure" upon Grady to get the contract signed and that he told him "either he sign that guarantee or \*\*\* I would have to part company with him and he would have to carry on his case alone."



Plaintiff cites our former opinion as his warrant for relying solely upon his purported written contract, but we do not think it is susceptible of this interpretation. Plaintiff having originally sued in assumpsit and equitable considerations having been interposed by way of defense, we merely held that the introduction of the notes was prima facie evidence of plaintiff's claim, and suggested upon reversal that when the case was redocketed, if defendant so desired he might seek a transfer from the common law to the chancery side of the court "where, upon amended pleadings, the consideration for the instruments may be impeached for fraud or duress, and if the evidence warrants it the instruments may be set aside, but upon such terms as are equitable and just between the parties." The courts of this state have consistently held that when a client attacks as unconscionable a contract with his attorney, whether it be for the excessiveness of the attorney's fees or for any other unfairness between the client and attorney, the client is not required to establish fraud or imposition, but the burden of proof is upon the attorney to show that the contract was entered into fairly, that the client was fully advised on all the facts, their adequacy and equity; and that upon the attorney's failure to make such proof, equity treats the case as one of constructive fraud. Jennings v. McConnel, 17 Ill. 148; Goranson v. Solomonson, 304 Ill. App. 80. Other decisions and authorities dealing with the same subject matter and following this doctrine are Ankrom v. Doss, 270 Ill. App. 464; Robinson v. Sharp, 201 Ill. 86; Warner v. Flack, 278 Ill. 303; and 2 Pomeroy Eq. Jur., sec. 960. The rule is not limited to transactions concerning the property involved in the litigation, but applies to any dealings between attorney and client, including contracts for fees and notes given therefor. Ankrom v. Doss, 270 Ill. App. 464; Faris v. Briscoe, 78 Ill. App. 242. It has also been held that before



Plaintiff cites our former opinion as his warrant for relying solely upon his purported written contract, but we do not think it is susceptible of this interpretation. Plaintiff having originally avowed in assumption and equitable considerations having been interposed by way of defense, we were held that the introduction of the notes was prima facie evidence of plaintiff's claim, and suggested upon reversal that when the case was reargued, if defendant so desired he might seek a transfer from the common law to the chancery side of the court "where, upon amended pleadings, the consideration for the instruments may be impeached for fraud or duress, and if the evidence warrants it the instruments may be set aside, but upon such terms as are equitable and just between the parties." The courts of this state have consistently held that when a client attacks as unconscionable a contract with his attorney, whether it be for the reasonableness of the attorney's fees or for any other unfairness between the client and attorney, the client is not required to establish fraud or imposition, but the burden of proof is upon the attorney to show that the contract was entered into fairly, that the client was fully advised on all the facts, their adequacy and equity; and that upon the attorney's failure to make such proof, equity treats the case as one of constructive fraud. Tennings v. McConnell, 17 Ill. 146; Garrison v. Solomonson, 304 Ill. App. 80. Other decisions and authorities dealing with the same subject matter and following this doctrine are Arnold v. Doss, 270 Ill. App. 464; Robinson v. Ward, 201 Ill. 86; Farney v. Black, 278 Ill. 303; and Lowrey vs. Tur, etc. 960. The rule is not limited to transactions concerning the property involved in the litigation, but applies to any dealing between attorney and client, including contracts for fees and notes given therefor. Arnold v. Doss, 270 Ill. App. 464; Paris v. Blasco, 78 Ill. App. 242. It has also been held that a for-

making any agreement with his client, the attorney must disclose all information which might affect the client's decision to agree to the contract. Broholm v. Anderson, 178 Ill. App. 623; Robinson v. Sharp, 201 Ill. 86. In conformity with this doctrine it was incumbent upon Hamilton to furnish the detailed facts and computations upon which the substantial fee which he claimed was predicated.

Hamilton takes the position, however, that the relationship of client and attorney did not exist when the agreement was made, contending that he had terminated the relationship about October 1, 1931. He insists that although the agreement bears date October 1, 1931, it was not signed until January, 1932, and then upon Grady's insistence that the relationship be resumed because of Hamilton's familiarity with the divorce proceeding, as to which there was still time to apply for leave to appeal to the Supreme court, and because of his familiarity with the Regan case. Grady, on the other hand, insists that the contract was presented to him about the date that it bears and was actually signed October 5. The master, evidently placing greater credence in Hamilton's testimony, sustained his contention as to the date of the signing of the contract and found that the relationship had in the interim been severed. The testimony of both parties indicates that the preservation of the relationship of client and attorney was the impelling motive for the execution of the agreement. Hamilton had conducted the divorce suit both in the trial court and in the Appellate court, and it was his familiarity with the case which undoubtedly prompted Grady to desire his continuance with the case for the preparation of a petition for rehearing in the Appellate court and a petition for leave to appeal to the Supreme court. Disregarding Grady's testimony that he continued with Hamilton because of his threat to injure him in the Regan case, it was undoubtedly because of Hamilton's familiarity with the divorce proceeding that he was able to exert "pressure," as he says, to secure







Grady's signature to the contract. These considerations evidently did not enter into the master's recommendations, but they are of controlling importance, and under the consistent ruling in this and other states, the law will not lend its support to an agreement procured under such circumstances.

Accordingly, we are of opinion that upon the record presented the agreement is not susceptible of enforcement. We do not pass upon the question whether Hamilton is entitled to additional fees or the amount thereof, but upon further hearing it will be incumbent upon him to adduce competent evidence as to the amount of the services that he claims and the extent thereof, so that the chancellor may determine whether he is entitled to additional compensation and the amount, if any, to be awarded to him. His admission that he had never given Grady any statement or information, and his failure to furnish detailed proof of the character and extent of his services, make it impossible for us to determine whether he is entitled to additional fees or the extent thereof, and the opportunity to make such showing will be presented to him upon further hearing.

Some dispute arises between the parties as to the question of the master's costs and expenses. This matter can be readily ascertained by the chancellor from facts to be presented to him and is left for further determination of the court.

The decree of the Circuit court is accordingly reversed and the cause remanded with directions to grant the relief prayed by the counterclaim and to afford plaintiff an opportunity to proceed further, if he so desires, upon the question of such fair and reasonable attorney's fees as he may be able to establish by competent evidence.

DECREE REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

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Some dispute arises between the parties as to the question of the master's costs and expenses. This matter can be readily ascertained by the chancellor from facts to be presented to him and is left for further determination of the court.

The decree of the Circuit court is accordingly reversed and the cause remanded with directions to grant the relief prayed by the complainant and to afford plaintiff an opportunity to proceed further, and if he so desires, upon the question of such fair and reasonable attorney's fees as he may be able to establish by competent evidence.

DECEME REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS

41906

ROBERT L. HASSENAUER, a minor,  
by LEO J. HASSENAUER, his father  
and next friend,

Appellee,

v.

F. W. WOOLWORTH CO., a corporation,  
Appellant.

47  
APPEAL FROM MUNICIPAL  
COURT OF EVANSTON, COOK  
COUNTY.

314 I.A. 569

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Robert L. Hassenauer, a minor, by his father and next friend, brought suit against F. W. Woolworth Company for false imprisonment by defendant's agents and employees who are alleged to have been acting within the scope of their authority and without any right or provocation. Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$250, from which defendant appeals.

The essential facts disclose that Robert Hassenauer, fourteen years of age, entered defendant's store at 18 North State street, Chicago, in the early afternoon of October 22, 1940, together with two companions, Don and Robert Murphy. They bought two donkey pins in the store, and after making other purchases, started to walk out. They were accosted by Harold Brown, the floorwalker, and William J. Korn, floor supervisor, who accompanied Brown. Plaintiff testified that Robert Murphy was stopped first and then two men "grabbed" the boys; one man had Robert Murphy by the arm and the other had Don and the plaintiff. They were taken downstairs through the store and cafeteria, to a room marked "For Employees Only," a distance of several hundred feet. The store was fairly crowded with customers at the time. On the way down plaintiff asked one of the men, "What is wrong?" and the man replied, "You will find out." According to plaintiff's testimony, when they reached the room in the basement to which they had been taken, the boys were told to empty



3141.A.568

COUNTY OF BAVASTON, COOK  
APPEAL FROM MUNICIPAL

F. W. WOOLWORTH CO., a corporation,  
Appellant,  
v.  
ROBERT L. HASSEMANER, a minor,  
by his father,  
and next friend,  
appellee.

41906

MR. JUSTICE FRINK DELIVERED THE OPINION OF THE COURT.

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their pockets. One of the men searched Robert Murphy, but did not place his hands on plaintiff's person or clothes. Shortly thereafter one of the men left the room for several minutes, then came back, told the boys to "grab" their stuff and come upstairs. On the way up the boys walked in front and the men followed them. While the boys were still in the basement plaintiff heard one of the men say, "Why don't you go upstairs and ask the lady if she sold the pins?" Reaching the main floor, the boys walked to a counter with Brown and Korn, and there one of the men asked the salesgirls if they had sold pins to the boys. One of them replied that she had done so. Thereupon the boys were released, and as they were walking out of the store one of the men said, "I hope there are no hard feelings." About fifteen minutes elapsed between the time they were apprehended and released.

The complaint alleged "That the defendant, by certain of its servants, then and there engaged in their master's business and acting within the scope of their authority as such servants, with force and arms, and without any right or provocation, wantonly and wilfully laid hold of the plaintiff and then and there compelled plaintiff to accompany them through its said store and down certain stairs and along and through certain parts of the said store and into a certain room \*\*\* and in plain view of divers customers and employees and other persons, and then and there so kept and imprisoned the said plaintiff, \*\*\* without any reasonable or probable cause whatsoever, for a long space of time, \*\*\* contrary to the laws of the State of Illinois and against the will of the plaintiff."

It is urged by defendant that under the foregoing allegations of the complaint plaintiff was required to prove (1) that he was restrained or detained against his will; (2) that such restraint and detention was willful and wanton; and (3) that the restraint or detention was without any reasonable or probable cause;

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The complaint alleged "that the defendant, by certain of its servants, then and there engaged in their master's business and acting within the scope of their authority as such servants, with force and arms, and without any right or provocation, wantonly and willfully laid hold of the plaintiff and then and there compelled plaintiff to accompany them through its said store and down certain stairs and along and through certain parts of the said store and into a certain room \*\*\* and in plain view of divers customers and employees and other persons, and then and there so kept and imprisoned the said plaintiff, \*\*\* without any reasonable or probable cause whatsoever, for a long space of time, \*\*\* contrary to the laws of the State of Illinois and against the will of the plaintiff."

It is urged by defendant that under the foregoing allegations of the complaint plaintiff was required to prove (1) that he was restrained or detained against his will; (2) that such restraint and detention was willful and wanton; and (3) that the restraint or detention was without any reasonable or probable cause;



and defendant's counsel argue that since the evidence fails to disclose that defendant's employees detained plaintiff in such a manner as to show that their actions were conceived in a spirit of mischief and in utter indifference to consequences, and therefore willful and wanton, the judgment should be reversed.

It is not denied that defendant's agents were acting within the scope of their authority, and the fact that they were doing their duty does not excuse or justify the detention if it was unlawful. One of defendant's salesladies having admitted selling merchandise to plaintiff, the jury was fully justified in finding that the detention was unwarranted. The courts in this and other states, as well as textbook writers, have consistently enunciated the rule that prima facie any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment, unless a showing of justification makes it a true or legal imprisonment, and that false imprisonment is necessarily a wrongful interference with the personal liberty of an individual. In Comer v. Knowles, 17 Kan. 436, a frequently cited case, the court said that false imprisonment is necessarily a wrongful interference with the personal liberty of an individual; that the "wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, \*\*\*. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention. \*\*\* All that is necessary is, that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard." (Italics ours.) This statement of the law was approved in Meints v. Huntington, 276 Fed. 245, and adopted in sub-

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stance as a definition of false imprisonment by the American Law Institute in its Restatement of the Law of Torts, vol. 1, p. 66, sec. 35.

There is also abundant authority holding that actual malice is not a necessary element of false imprisonment and need neither be alleged nor proved. Shanley v. Wells, 71 Ill. 78; Oliver v. Kessler, 95 S. W. (2d) 1226; 22 Am. Jur., False Imprisonment, sec. 4, p. 357.

Nor would the fact that the complaint had charged the false imprisonment to have been willful and wanton, without proof of actual malice, preclude plaintiff from recovery. In Devereaux v. Belsey, 7 Fed. Supp. 991, the use of the word "maliciously" in the charge of false imprisonment was held to be surplusage, and our courts have said that whether the injury was inflicted willfully or wantonly is a question of fact to be determined by the jury and depends upon the circumstances of each case. Streeter v. Humrichouse, 357 Ill. 234.

Although malice may be the gist of some actions such as malicious prosecution, it is not necessary for plaintiff in an action for false imprisonment to prove that malice actually existed, since malice may be implied in law or inferred from a want of probable cause in an action for false imprisonment.

The rule in this state is well set forth in Schramko v. Boston Store, 243 Ill. App. 251. Plaintiff, a minor, who was charged with stealing jewelry while in a department store, apprehended and later released, there sued to recover damages for alleged false arrest and imprisonment. In discussing the law applicable to the facts, the court stated the rule as follows: "False imprisonment is 'any unlawful exercise or show of force, by which a person is compelled to remain where he does not wish to remain, or to go where he does not wish to go.'" Durgin v. Cohen, 168 Minn. 77, 209 N. W. 532. False imprisonment is 'the unlawful



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Nor would the fact that the complainant had charged the false imprisonment to have been willful and wanton, without proof of actual malice, preclude plaintiff from recovery. In Deverson v. Helsey, 7 Fed. Supp. 991, the use of the word "maliciously" in the charge of false imprisonment was held to be surplusage, and our courts have said that whether the injury was inflicted willfully or wantonly is a question of fact to be determined by the jury and depends upon the circumstances of each case. Streater v. Harbichouse, 357 Ill. 234.

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Boston Store, 243 Ill. app. 251. Plaintiff, a minor, who was charged with stealing jewelry while in a department store, apprehended and later released, there sued to recover damages for alleged false arrest and imprisonment. In discussing the law applicable to the facts, the court stated the rule as follows: "False imprisonment is 'any unlawful exercise or show of force, by which a person is compelled to remain where he does not wish to remain, or to go where he does not wish to go.' Turner v. Cohen, 108 Minn. 77, 209 N. W. 532. False imprisonment is 'the unlawful

restraint by one person of the physical liberty of another. The true test seems to be, not the extent of the restraint, but the lawfulness thereof.' Weiler v. Herzfeld-Phillipson Co., 89 Wis. 554, 208 N. W. 599."

Under the foregoing decisions it is of no importance that the actions of defendant's agents were not conceived in a spirit of mischief or in utter indifference to consequences. The undisputed facts indicate that plaintiff was unlawfully restrained, without any reasonable or probable cause. The failure of defendant's agents Brown and Korn to investigate the circumstances before apprehending plaintiff are similar to the facts in Lindquist v. Friedman's Inc., 285 Ill. App. 71, where the court, in affirming a judgment for damages in a false imprisonment charge, called attention to the fact that if Friedman or his employees had made even a slight investigation, he could have ascertained without difficulty that plaintiffs were innocent and said that "Failure to investigate, resulting in unlawful imprisonment, connotes malice. Hirsch v. Feeney, 83 Ill. 548."

It is also urged that the court erred in giving certain instructions on behalf of plaintiff and refusing to give others requested by defendant. Plaintiff submitted nine instructions, of which only five were allowed. Opposed to these, defendant submitted eighteen, of which the court allowed fourteen. The instructions offered by defendant and allowed by the court covered every phase of the case and sufficiently charged the jury as to the law applicable to the facts. Although the instructions given on behalf of plaintiff and those of defendant refused by the court are criticized by counsel, scant authority is cited to support the argument. After an examination of the instructions as a whole we think they properly charged the jury as to the law and are free from the criticism made.

The remaining ground urged for reversal is that the damages

restrained by one person of the physical liberty of another. The true test seems to be, not the extent of the restraint, but the lawfulness thereof. Miller v. Hartzfeld-Phillips Co., 89 Wis. 554, 208 N. W. 599.

Under the foregoing decisions it is of no importance that the actions of defendant's agents were not conceived in a spirit of mischief or in utter indifference to consequences. The undisputed facts indicate that plaintiff was unlawfully restrained, without any reasonable or probable cause. The failure of defendant's agents Brown and Korn to investigate the circumstances before apprehending plaintiff are similar to the facts in Industrious v. Friedman's Inc., 285 Ill. App. 71, where the court, in affirming a judgment for damages in a false imprisonment charge, called attention to the fact that if Friedman or his employees had made even a slight investigation, he could have ascertained without difficulty that plaintiffs were innocent and said that "Failure to investigate, resulting in unlawful imprisonment, connects malice." Hirsch v. Feinberg, 83 Ill. 748.

It is also urged that the court erred in giving certain instructions on behalf of plaintiff and refusing to give others requested by defendant. Plaintiff submitted nine instructions, of which only five were allowed. Opposed to these, defendant submitted eighteen, of which the court allowed fourteen. The instructions offered by defendant and allowed by the court covered every phase of the case and sufficiently charged the jury as to the law applicable to the facts. Although the instructions given on behalf of plaintiff and those of defendant refused by the court are criticized by counsel, sound authority is cited to support the argument. After an examination of the instructions as a whole we think they properly charged the jury as to the law and are free from the criticism made. The remaining ground urged for reversal is that the damages



are excessive. The amount of damages is largely a question for the jury and should not be interfered with unless it appears to have been the result of prejudice, passion, or disproportionate to the damages suffered. Considering the fact that plaintiff was obliged to retain counsel to institute suit and defend the judgment in this court, we do not think that the verdict can well be subjected to the charge that it was excessive.

The case was fairly tried. Since we find no convincing reason for reversal, the judgment of the Municipal court is affirmed,

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

are excessive. The amount of damages is largely a question for the jury and should not be interfered with unless it appears to have been the result of prejudice, passion, or disproportionate to the damages suffered. Considering the fact that plaintiff was obliged to retain counsel to institute suit and defend the judgment in this court, we do not think that the verdict can well be subjected to the charge that it was excessive.

The case was fairly tried. Since we find no convincing reason for reversal, the judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scamman, P. J., and Sullivan, J., concur.

42023

NATIONAL BANK OF DETROIT,  
a banking corporation,  
Appellant,

v.

DAVID SACHS,

Appellee.

48  
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

314 I.A. 570

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

National Bank of Detroit brought suit on a check dated September 11, 1940, drawn by defendant, David Sachs, on the Central National Bank of Chicago and payable to the order of Sam Bloom for \$1,169.15. Bloom had indorsed the check without restriction and deposited it in his account with the Detroit bank on the following day and received credit therefor. This, added to previous deposits by Bloom, gave him a total credit balance of \$3,813.20. September 13 the bank honored two of Bloom's checks, one of \$138.02 and the other for \$2,600, thus reducing the credit balance to \$1,075.18. September 14 Bloom drew a check of \$765 on his account, which was honored, reducing the credit balance to \$310.18. September 17 Sachs' check was returned with the notation, "PAYMENT STOPPED." The bank claims that by honoring these checks it paid money for Sachs' check of \$1,169.15 and is therefore entitled to recover the difference between the amount of the Sachs' check and the balance of \$310.18 left in the account, plus protest fees of \$2.60, or an aggregate of \$865.99, together with costs. The court heard the cause without a jury and entered a finding and judgment for defendant, from which the bank appeals.

The parties stipulated on trial that defendant has a set-off against Sam Bloom in the sum of \$3,380.10, and both counsel conceded that plaintiff's right to recovery depended on whether or not it was a holder in due course for value. Defendant



APPEAL FROM MUNICIPAL COURT  
OF CHICAGO

314 I.A. 570

NATIONAL BANK OF DETROIT,  
a banking corporation,  
Appellant,

DAVID SACHS,

Appellee.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

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September 11, 1940, drawn by defendant, David Sachs, on the

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Sam Bloom for \$1,169.15. Bloom had indorsed the check without

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The parties stipulated on trial that defendant has a

set-off against Sam Bloom in the sum of \$3,380.10, and both

counsel conceded that plaintiff's right to recovery depended on

whether or not it was a holder in due course for value. Defendant

takes the position that the bank was not a holder in due course but merely an agent for collection, and that since he had a good defense by way of set-off against Bloom in excess of the face value of the check, he also had a good defense to the bank's suit. This argument is predicated upon the proposition that the deposit book and slip constitute a contract between the parties and determine their relationship. Two Illinois cases and one decision in Michigan are relied on for support of this contention. Home Bank & Trust Co. v. Bogorad, 242 Ill. App. 16; People v. Michigan Trust Co., 242 Ill. App. 579; Davidow v. Bank of Detroit, 254 Mich. 447, 236 N. W. 828. The question presented in all these cases was whether under the agreement between the bank and the depositor appearing in the pass book and deposit slip, title to the paper remained in the depositor or passed to the bank. In the Bogorad case the depositor's account with the bank was subject to an express agreement "that all checks \*\*\* deposited with and received by this bank for collection or credit \*\*\* are delivered to and received by this bank expressly and only upon condition that this bank acts only as your agent for your account and convenience, and assumes no responsibility whatever \*\*\*." In pursuance of this provision the court held that the bank was not the owner of the check, because under the agreement the bank was expressly designated as agent and therefore could not be the owner or principal. In reaching this conclusion the court said that it would be utterly inconsistent that the bank should accept checks for deposit on an express understanding that it does so as agent only, and at the same time assert ownership thereto against the maker, and that "It cannot occupy both positions in the same transaction. \*\*\* The logical conclusion therefrom is that the bank's relationship is that of agent, and, therefore, it did not obtain title to the check." The decision is clearly confined to the agency provision of the agreement between the par-



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ties, and the following excerpt from the opinion indicates that the court did not recognize that rule as applying to cases where no agency exists: "An extensive line of authorities on the effect of the deposit of indorsed paper to pass title to the bank, under varying circumstances, may be found in an annotation in 11 A. L. R. 1060. It is there said that the majority of cases hold that where there is no definite understanding between the depositor and the bank as to the ownership of the paper, and the paper is indorsed without restriction and deposited to the depositor's account and he is given credit therefor with the right to draw thereon, title passes to the bank. Decisions in this state are in line with those authorities."

The second case relied on by defendant, People v. Michigan Avenue Trust Co., supra, is to the same effect. The pass book there issued provided that "Checks on this bank will be credited conditionally. If not found good at close of business, they will be charged back to depositors, and the latter notified of the fact. \*\*\* This bank in receiving checks or drafts on deposit or for collection, acts only as your agent, and beyond carefulness in selecting agents at other points, and in forwarding to them, assumes no responsibility." The court pointed out that the authorities are not harmonious upon the general question whether title to checks deposited by a customer of a bank to his account passes to the bank by an unrestricted indorsement of the paper deposited, referred to collected cases appearing in an exhaustive note in 11 A. L. R. 1043, and said that under the majority view, as recognized in Illinois in numerous cases cited in the opinion, where a deposit is made and immediate credit is given to the depositor, subject to the right on the part of the bank to charge back any check or draft that is not paid, title to the paper passes to the bank, and the relation thereby created between the bank and the depositor

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is that of debtor and creditor, in the absence of any agreement to the contrary. However, in view of the agreement contained in the pass book, it held that the bank merely became the depositor's agent and not the holder of the paper.

In the third case, Davidow v. Bank of Detroit, supra, the deposit book provided that, "This bank in receiving checks, drafts and notes or other items on deposit or for collection acts as your agent only." The Michigan court held that by reason of this provision the note remained the property of the plaintiff in that case. There is complete uniformity in these decisions, the conclusions in each instance being predicated upon an express agreement, between the bank and the depositor, which designated the bank as agent, and obviously under such a provision the bank could not well obtain title to the check.

We find cited in plaintiff's brief American Trust and Savings Bank v. Gueder & Paeschke Mfg. Co., 150 Ill. 336, wherein the payee of a check indorsed it to his banker "for deposit," to be placed to the depositor's credit, and mailed it to his bank. Upon receipt of the check the bank gave the depositor credit on account for the face value of the check, and after stamping on the check "For collection and return" the bank forwarded it to the drawer for payment. Under these circumstances it was held that the deposit of the check was, in legal effect, a negotiation of the same so as to vest the legal title in the bank, with the right on its part to charge it back to the depositor in case it was not paid on presentment, and that the credit given the depositor in its account was a sufficient consideration for the assignment.

In the case at bar defendant relies on the provisions of the deposit slip and pass book which both provide (1) that "Credits for all items are subject to final payment in cash or solvent credits"; (2) that "All items transmitted for collection to any



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Federal Reserve Bank shall be governed by the rules and regulations of such bank and of the Federal Reserve Board"; and (3) that "Any item drawn on or payable at this bank may be charged back to the depositor at or before the end of the business day next following the day of deposit in the event the item is found not good or payable for any reason." None of these provisions is analogous to the agreements contained in the cases upon which defendant relies. Moreover, the agreement that credits for all items are subject to final payment in cash or solvent credits, and that any items may be charged back if not collected, is not inconsistent with ownership of the check, as defendant contends, especially after the money has been paid for the check and until it is charged back. When the money is thus paid for the paper, the bank becomes the owner thereof, and what is done thereafter does not change the relationship between the parties. These conclusions are supported by the statute of Michigan, where the transaction took place, and Michigan decisions interpreting the statute. Section 54 (par. 19.94) of the Negotiable Instruments Law (Michigan Statutes Annotated (1937), vol. 14) provides that a holder in due course is one who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; and (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it. Section 28 (par. 19.68) of the act defines a holder for value as follows: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." (Italics ours.) Section 56 (par. 19.96) provides that "Where the transferee re-

Federal Reserve Bank shall be governed by the rules and regulations of such bank and of the Federal Reserve Board; and (3) that "any item drawn on or payable at this bank may be charged back to the depositor at or before the end of the business day next following the day of deposit in the event the item is found not good or payable for any reason." None of these provisions is analogous to the agreements contained in the cases upon which defendant relies. Moreover, the agreement that credits for all items be subject to final payment in cash or solvent credits, and that any items may be charged back if not collected, is not inconsistent with ownership of the check, as defendant contends, especially after the money has been paid for the check and until it is charged back. When the money is thus paid for the paper, the bank becomes the owner thereof, and what is done thereafter does not change the relationship between the parties. These conclusions are supported by the statute of Michigan, where the transaction took place, and Michigan decisions interpreting the statute. Section 54 (part. 19.94) of the Negotiable Instruments Law (Michigan Statutes Annotated (1937), vol. 14) provides that a holder in due course is one who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such be the fact; (3) that he took it in good faith and for value; and (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it. Section 28 (part. 19.68) of the act defines a holder for value as follows: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." (Italics ours.) Section 56 (part. 19.96) provides that "where the transferee



ceives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

Upon trial plaintiff read the deposition of Joseph Wersching, an employee of the bank. He testified that the bank permitted Bloom to draw against Sachs' check, and the ledger sheet, which was received in evidence, so shows. When the check for \$1,169.15 was deposited, the balance in Sachs' account was \$3,813.20, indicating that before deposit of the instrument, his balance was \$2,644.05. When plaintiff honored the two checks for \$138.02 and \$2,600, respectively, it necessarily paid on Sachs' check the difference between the balance of \$2,644.05 and \$2,738.02, or \$93.97. Subsequently, when it honored the last check for \$765 drawn against the account, it paid that much more on defendant's check. Accordingly, there seems to be little room for doubt that credit was given for the check on which this suit is brought. Several cases cited in plaintiff's brief support this conclusion. Drovers' National Bank v. Blue, 110 Mich. 31, 67 N. W. 1105; Warman v. First National Bank, 185 Ill. 60; City Deposit Bank v. Green, 130 Iowa 384, 106 N. W. 942. In the first of these decisions the court said that in order to prove itself a holder for value the bank must show that the credit was drawn upon or that the account was exhausted before the maturity of the note or before notice of the fraud. In the Warman case it was held that the bank must not only show that it credited the proceeds of the discounted note by way of deposit in favor of the payee and that the payee was not indebted to the bank, but it must also prove that the amount due on such deposit had not been withdrawn.

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for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time, and (sec. 3418) where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. (Remington's Revised Statutes of Washington Annotated (1932), vol. V.) In Old National Bank v. Gibson, 105 Wash. 578, 179 Pac. 117, 6 A. L. R. 247, the bank received a check for collection and credited it to the depositor's account upon condition that it be charged back in case of dishonor. Subsequently it permitted the depositor to withdraw the amount of the check before learning of its dishonor. In discussing the relationship of the parties, the court cited the foregoing provisions of the Negotiable Instruments Act, and said that "according to the plain language of the statute, it [the bank], under the facts pleaded here, became a holder for value to the full amount for which the check was drawn. The statute above referred to expresses only what has been the law of negotiable paper since the time 'whereof the memory of man runneth not to the contrary.'"

The weight of authority supports plaintiff's contention that it is a holder in due course of Sachs' check up to the amount of the overdraft, and as such it should be allowed to recover from defendant the sum of \$865.99. Since nothing can be gained by retrial of the case, the order of the Municipal court is reversed and judgment is entered here in favor of plaintiff and against defendant for \$865.99 and costs.

ORDER REVERSED AND JUDGMENT  
HERE FOR PLAINTIFF.

Scanlan, P. J., and Sullivan, J., concur.



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ORDER REVERSED AND JUDGMENT  
MADE FOR PLAINTIFF.

40999

FREDERICK B. THOMAS,  
Appellee,

v.

F. THOMAS MORRIS et al.,  
Defendants.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

SEPARATE APPEAL OF  
FRANK D. QUINN,  
Appellant.

314 I.A. 570<sup>2</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This proceeding is in the nature of an action for interpleader, in which Frederick B. Thomas filed a complaint wherein he sought a determination of his right and that of several other brokers to a commission on the sale of certain property and particularly to a fund of \$3,900, which the sellers had deposited with the Continental Illinois National Bank & Trust Company of Chicago to cover the amount admittedly due to the broker or brokers entitled to the commission on the sale. The complaint as amended names as parties defendant, F. Thomas Morris, Frank D. Quin and Abraham S. Nahin, who individually and severally claimed the commissions on the sale, the Northern Trust Company and William C. Freeman and Peter B. Carey, Trustees, as the owners or sellers of the property, and the Continental Illinois National Bank & Trust Company of Chicago, as escrowee of the deposit.

Defendant Quinn filed an answer alleging that he was the only broker entitled to the commission and he also filed a counterclaim asking that a judgment be entered in his favor as to the commission of \$3,900 deposited in escrow.

The cause was referred to a master in chancery, who found the issues in favor of plaintiff Thomas and defendant Morris and recommended that the fund held in escrow be divided equally between them after deducting certain costs and expenses and that

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Thomas and Morris be paid the further sum of \$4,500 if Cuneo, the purchaser of the property in question, exercised an option given him to purchase an adjacent tract of land. The master overruled objections filed by defendants Quin and Morris to his amended report. The chancellor overruled the exceptions of defendants Quin and Morris to the master's amended report and entered a decree in accordance with the recommendations contained in said report.

Defendant Morris filed a notice of appeal from the decree but failed to complete same in this court. Defendant Nahin did not file a notice of appeal. Defendant Quin perfected a separate appeal, which is before us for consideration.

The findings of fact, conclusions and recommendations of the master in chancery pertinent to this appeal are as follows:

"FINDINGS OF FACT

"That on April 1, 1935, The Northern Trust Company as Trustee under trust agreement dated June 14, 1932, and known as Trust No. 9914, was the record owner of certain real estate in Libertyville, Lake County, Illinois, described as Parcel 'A' and Parcel 'B', in paragraph 1 of the Complaint filed herein by plaintiff, and that William C. Freeman and Peter B. Carey, Successor Trustees under agreement between Samuel Insull and Central Republic Bank and Trust Company, dated June 14, 1932, and known as Trust No. 14958, or their predecessor trustees under said agreement, were on said April 1st and until the sale of said real estate the beneficial owners thereof.

"That the plaintiff, FREDERICK B. THOMAS, and the defendants, F. THOMAS MORRIS, FRANK D. QUIN and ABRAHAM S. NAHIN, and each of them, were on April 1, 1935 and since that date, engaged in the business of real estate brokerage, and then held and now held certificates of registration as real estate brokers \*\*\*.

"That on or about June 25, 1937, the said The Northern Trust Company, as Trustee as aforesaid, and the said William C. Freeman and Peter B. Carey, Successor Trustees as aforesaid, entered into an agreement with John F. Cuneo for the sale of Parcel 'A' of said real estate for the sum of \$122,500, and for the additional consideration of \$7,500 granted said John F. Cuneo an option to purchase Parcel 'B' for the sum of \$150,000, which said agreement was thereafter consummated by the payment by said John F. Cuneo to said Trustees of the sum of \$130,000 for said Parcel 'A' and for said option.

"That the defendant, Frank D. Quin, made claim upon the defendants, The Northern Trust Company, Trustee as aforesaid,

Thomas and Morris be paid the further sum of \$4,500 if Cunniff, the purchaser of the property in question, exercised an option given him to purchase an adjacent tract of land. The master overruled objections filed by defendants Quinn and Morris to his amended report. The chancellor overruled the exceptions of defendants Quinn and Morris to the master's amended report and entered a decree in accordance with the recommendations contained in said report.

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#### "FINDINGS OF FACT"

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"That the plaintiff, KENNEDRICK B. THOMAS, and the defendants, F. THOMAS MORRIS, FRANK D. QUINN and ABRAHAM S. MARIN, and each of them, were on April 1, 1937 and since that date, engaged in the business of real estate brokerage, and then held and now hold certificates of registration as real estate brokers \*\*\*.

"That on or about June 22, 1937, the said Northern Trust Company, as Trustee as aforesaid, and the said William C. Freeman and Peter B. Carey, Successor Trustees as aforesaid, entered into an agreement with John F. Cunniff for the sale of Parcel 'A' of said real estate for the sum of \$122,500, and for the additional consideration of \$7,500 granted said John F. Cunniff an option to purchase Parcel 'B' for the sum of \$170,000, which said agreement was thereafter consummated by the payment by said John F. Cunniff to said Trustees of the sum of \$130,000 for said Parcel 'A' and for said option.

"That the defendant, Frank D. Quinn, made claim upon the defendants, The Northern Trust Company, Trustees as aforesaid,



and William C. Freeman and Peter B. Carey, Successor Trustees, as aforesaid, for a share of any brokerage commission payable by them by reason of said sale; that the defendant F. Thomas Morris also made claim upon said defendants, The Northern Trust Company, Trustee as aforesaid, and William C. Freeman and Peter B. Carey, Successor Trustees, as aforesaid, that he was entitled to any brokerage commission payable by them by reason of said sale; and that the defendant Abraham S. Nahin, also made claim upon the defendant Peter Carey, Trustee, and upon one John Gallagher, Agent, as broker through Frank D. Quin, agent, for full commissions on said sale,

"That the amount of commission payable on said sale by the Trustees for the owners of said premises is 3% of said sum of \$130,000 paid for said Parcel 'A', or the sum of \$3,900, and the additional sum of \$4,500 in the event that the option to purchase said Parcel 'B' for the sum of \$150,000 shall be exercised pursuant to the terms of said agreement of sale.

"That the commission of \$3,900 for the sale of said Parcel 'A' was deposited with the Continental Illinois National Bank and Trust Company of Chicago, as Escrow Agent, by William C. Freeman and Peter B. Carey, Successor Trustees as aforesaid, under the terms of an Escrow Agreement dated September 16, 1937 signed by said Trustees as Depositors, consented and agreed to by Frank D. Quin and Frederick B. Thomas, and receipt of said sum and agreement to hold and dispose of same in accordance with the provisions of said agreement made by said Continental Illinois National Bank and Trust Company of Chicago.

"That said Escrow Agreement provided, among other things: 'The Escrow Agent is authorized to pay said sum of Three Thousand Nine Hundred Dollars (\$3,900) upon the joint written order of Frederick B. Thomas, of 743 Elm Street, Winnetka, Illinois, F. Thomas Morris, of 111 West Washington Street, Chicago, Illinois, Frank D. Quin of 3816 North Ridgway Street, Chicago, Illinois, and the Depositors or their successors in trust, or pursuant to an order of Court as hereinafter specified.'

"That the defendant Quin signed the escrow on the condition and with the understanding that it would not be binding upon him until or unless said escrow was signed by the plaintiff Thomas and defendant Morris, and the defendant Morris never executed or signed said escrow.

"That the defendant F. Thomas Morris, was not a party to the escrow of the commission on the sale with the defendant, Continental Illinois National Bank and Trust Company, as escrowee.

"That the defendant, F. Thomas Morris, on or shortly after April 1, 1935 suggested John Cuneo to Frederick B. Thomas as a prospect for the purchase of farm property north and west of Chicago; that Thomas and Morris agreed upon an equal division of the commission in the event of a sale of the property to Cuneo; that the reason for Morris not appearing in the deal was that Morris was trying to sell a large Chicago property to Cuneo; that Frederick B. Thomas is located in Winnetka, Illinois, and specializes in the sale of real estate north and west of Chicago.

"That on April 11, 1935, Frederick B. Thomas submitted to Cuneo a list of six (6) properties for the purpose of determining the kind of property Cuneo wanted; that he talked to Cuneo on the



and William C. Freeman and Peter A. Carey, Successor Trustees, as aforesaid, for a share of any brokerage commission payable by them by reason of said sale; that the defendant F. Thomas Morris also claims upon said defendants, The Northern Trust Company, Trustee as aforesaid, and William C. Freeman and Peter A. Carey, Successor Trustees, as aforesaid, that he was entitled to any brokerage commission payable by them by reason of said sale; and that the defendant Abraham S. Kahn, also claims upon the defendant Peter Carey, Trustee, and upon one John Gallagher, Agent, as broker through Frank D. Quinn, agent, for full commissions on said sale.

"That the amount of commission payable on said sale by the Trustee for the owners of said premises is 3% of said sum of \$150,000 paid for said Parcel 'A', or the sum of \$4,500, and the additional sum of \$4,500 in the event that the option to purchase said Parcel 'D' for the sum of \$150,000 shall be exercised pursuant to the terms of said agreement of sale.

"That the commission of \$3,900 for the sale of said Parcel 'A' was deposited with the Continental Illinois National Bank and Trust Company of Chicago, as Escrow Agent, by William C. Freeman and Peter A. Carey, Successor Trustees as aforesaid, under the terms of an Escrow Agreement dated September 10, 1935, signed by said Trustees as Depositors, contained and agreed to by Frank D. Quinn and Frederick B. Thomas, and recited in said agreement to hold and dispose of same in accordance with the provisions of said agreement made by said Continental Illinois National Bank and Trust Company of Chicago.

"That said Escrow Agreement provided, among other things: 'The Escrow Agent is authorized to pay said sum of Three Thousand Nine Hundred Dollars (\$3,900) upon the joint written order of Frederick B. Thomas, of 443 Elm Street, Evanston, Illinois, and Thomas Morris, of 111 West Washington Street, Chicago, Illinois, Frank D. Quinn of 3816 North Ridgeway Street, Chicago, Illinois, and the Depositors or their successors in trust, or pursuant to an order of Court as hereinafter specified.'

"That the defendant who signed the escrow on the condition and with the understanding that it would not be binding upon him until or unless said escrow was signed by the plaintiff Thomas and defendant Morris, and the defendant Morris never executed or signed said escrow.

"That the defendant F. Thomas Morris, was not a party to the escrow of the commission on the sale with the defendant Continental Illinois National Bank and Trust Company, as aforesaid.

"That the defendant F. Thomas Morris, on or shortly after April 1, 1935, suggested to John Quinn to Frederick B. Thomas as a prospect for the purchase of farm property north and west of Chicago; that Thomas and Morris agreed upon an equal division of the commission in the event of a sale of the property to Quinn; that the reason for Morris not appearing in the deal was that Morris was trying to sell a large Chicago property to Quinn; that Frederick B. Thomas is located in Evanston, Illinois, and specializes in the sale of real estate north and west of Chicago.

"That on April 11, 1935, Frederick B. Thomas submitted to Quinn a list of six (6) properties for the purpose of determining the kind of property Quinn wanted; that he talked to Quinn on the

'phone May 4, 1935 and submitted the so-called Insull Farm, which includes Parcels 'A' and 'B' herein referred to, and confirmed the conversation and the submission of such property by letter on the same date; that on or about June 1st or 2nd, 1935, Mr. Thomas took Mr. and Mrs. John Cuneo to examine the Insull Farm, and again on August 21st, took Mr. Cuneo to make another inspection of the place; that on November 1, 1935 Thomas wrote another letter to Cuneo describing the soil conditions on the Insull Farm, and recommending them and recommending the farm; that in the summer of 1936 Thomas advised Morris of the efforts of another broker named Quin to sell the Insull property to Cuneo; and that on or about April 10, 1937 Thomas interviewed John B. Gallagher, one of the agents in charge of the Insull property and told him he was working on Cuneo as a prospective purchaser; that from the time Thomas first interviewed Cuneo until May 1, 1937, he 'phoned Cuneo at intervals concerning the deal.

"That on April 25, 1937 Thomas had Morris come to his office and Morris and Thomas went out and inspected a farm called the 'Schraeger Farm', which Morris on April 27, 1937 submitted to Mr. Cuneo; that on April 27, 1937 Morris first approached Cuneo directly to interest him in the purchase of the Insull Farm in a letter addressed to Cuneo by Morris on that date, and that he first interviewed Cuneo personally concerning the Insull Farm on May 5.

"That on May 15, 1937 Thomas visited Morris at Morris' office in Chicago and inquired about Morris' progress in the Cuneo deal.

"That Frank D. Quin, defendant, first submitted the property to Cuneo in the Fall of 1935, subsequent to submission of the property by Thomas, and while Thomas was still negotiating with Cuneo; that from and after Quin's submission of the Insull Farm to Cuneo, Quin continued to see Cuneo from time to time with reference to the purchase of the property and took Mr. and Mrs. Cuneo out to see it; that Abraham S. Nahin furnished a car which Quin used to visit the property with Nahin, and Nahin also furnished some maps of the property used by Quin.

"That Cuneo continued to be interested in the purchase of the property from the time it was first shown to him by Thomas on May 4, 1935 until its purchase.

"That the parties to the sale were brought together at a conference on June 1, 1937 arranged by F. Thomas Morris, and substantially agreed orally on the terms of the sale at said conference, and that the said F. Thomas Morris was present.

#### "CONCLUSIONS

"That the joint efforts of FREDERICK B. THOMAS and F. THOMAS MORRIS were the procuring and proximate cause of the sale of the property to Cuneo; Thomas had the property listed for sale and Morris did not; Thomas showed it to Cuneo in the first instance and kept his interest alive in the deal; F. Thomas Morris brought the negotiations to a successful conclusion.

"That the defendant, F. THOMAS MORRIS, while not a party to the escrow of the commission on the sale with the escrowee, has recognized the validity of the same by asking herein for a decree against said fund so deposited in escrow.

"That F. THOMAS MORRIS and FREDERICK B. THOMAS are



phone May 4, 1937 and submitted the so-called Insull Plan, which includes parcels 'A' and 'B' herein referred to, and confined the conversation and the submission of such property by letter on the same date; that on or about June 1st or 2nd, 1937, Mr. Thomas took Mr. and Mrs. John Gurneo to examine the Insull Farm, and again on August 21st, took Mr. Gurneo to make another inspection of the place; that on November 1, 1937, Thomas wrote another letter to Gurneo describing the said conditions on the Insull Farm, and recommending that he and recommending the farm; that in the summer of 1936 Thomas advised Morris of the efforts of another broker named Guin to sell the Insull property to Gurneo; and that on or about April 10, 1937, Thomas interviewed John B. Gallagher, one of the agents in charge of the Insull property, and told him he was working on Gurneo as a prospective purchaser; that from the time Thomas first interviewed Gurneo until May 1, 1937, he phoned Gurneo at intervals concerning the deal.

"That on April 25, 1937 Thomas had Morris come to his office and Morris and Thomas went out and inspected a farm called the 'Schreyer Farm', which Morris on April 27, 1937 submitted to Mr. Gurneo; that on April 27, 1937 Morris first approached Gurneo directly to interest him in the purchase of the Insull Farm in a letter addressed to Gurneo by Morris on that date, and that he first interviewed Gurneo personally concerning the Insull Farm on May 2.

"That on May 15, 1937 Thomas visited Morris at Morris' office in Chicago and inquired about Morris' progress in the Gurneo deal.

"That Frank D. Guin, defendant, first submitted the property to Gurneo in the fall of 1936, subsequent to submission of the property by Thomas, and while Thomas was still negotiating with Gurneo; that from and after Guin's submission of the Insull Farm to Gurneo, Guin continued to see Gurneo from time to time with reference to the purchase of the property and took Mr. and Mrs. Gurneo out to see it; that Abraham S. Mahin furnished a car which Gurneo used to visit the property with Mahin, and Mahin also furnished some maps of the property used by Guin.

"That Gurneo continued to be interested in the purchase of the property from the time it was first shown to him by Thomas on May 4, 1937 until its purchase.

"That the parties to the sale were brought together at a conference on June 1, 1937 arranged by F. Thomas Morris, and substantially agreed orally on the terms of the sale at said conference, and that the said F. Thomas Morris was present.

#### "CONCLUSIONS"

"That the joint efforts of THOMAS MORRIS and F. THOMAS MORRIS were the procuring and proximate cause of the sale of the property to Gurneo; Thomas had the property listed for sale and Morris did not; Thomas showed it to Gurneo in the first instance and kept his interest alive in the deal; F. Thomas Morris brought the negotiations to a successful conclusion.

"That the defendant F. THOMAS MORRIS, while not a party to the execution of the commission on the sale with the escrowee, has recognized the validity of the same by asking herein for a decree against said fund so deposited in escrow.

"That F. THOMAS MORRIS and FREDERICK B. THOMAS are



entitled to the remainder of said fund in escrow, after deducting the sum of ONE HUNDRED FIVE DOLLARS (\$105.00) for escrowee's costs and expenses as aforesaid, to be divided between them in equal proportions; and that their respective shares of the costs of this suit, including stenographer's and Master's fees as hereinafter recommended should be deducted from each of their shares of said escrow fund before payment to them of the amounts then due them therefrom; and that if the option to purchase Parcel 'B' herein-after referred to is exercised by the said JOHN F. CUNEO the commission thereon will be due to the said F. THOMAS MORRIS and FREDERICK B. THOMAS, to be divided between them in equal proportions.

"That Quin's claim for a commission from the sellers on the theory that the sellers were unfair to him in selling through Morris to Cuneo at a lower price than they quoted to Quin is not tenable because Quin is not the procuring cause of the sale."

"The defendant Quin is not bound by the terms of the escrow because he signed the said agreement on the condition and with the understanding that it would not be binding upon him until and unless the plaintiff Thomas and defendant Morris signed said escrow, and said escrow was not signed by the defendant Morris. The defendant Quin, however, is bound by the terms of the escrow because he has recognized the validity of the same by asking here for a decree against the funds so deposited in escrow."

#### "RECOMMENDATIONS

"That a decree be entered herein directing the said CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, escrowee, to deduct and retain for itself as its fees and expenses and costs as said escrowee, the sum of ONE HUNDRED FIVE DOLLARS from said escrow fund of THIRTY-NINE HUNDRED DOLLARS; that the decree provide that in the event the option to purchase said Parcel 'B' herein referred to is exercised by the said JOHN F. CUNEO, that the said F. Thomas Morris and FREDERICK B. THOMAS are the brokers entitled to share in said commission equally."

"That the prayers of the said Frank D. Quin and Robert S. Nahin for commission out of said escrow fund on the sale of Parcel 'A', or commission on the sale of Parcel 'B' should the option of John F. Cuneo to purchase be exercised, be denied. \*\*\*\*"

As heretofore stated the decree was entered in accordance with the recommendations of the master that the commission presently due and on deposit with the escrowee be paid in equal share to the plaintiff Thomas and the defendant Morris after deducting fees, costs and charges and that in the event that Cuneo exercised his option to purchase the additional property Thomas and Morris were entitled to share equally the commission on the sale of that property."

The theory of the defendant Quinn, as stated in his brief, is "(a) That he was the procuring cause of the sale and the first to introduce the contracting parties. (b) That plaintiff Thomas

entitled to the remainder of said fund in escrow, after deducting the sum of ONE HUNDRED FIFTY DOLLARS (\$150.00) for escrowee's costs and expenses as aforesaid, to be divided between them in equal proportions; and that their respective shares of the costs of this suit, including attorney's and Master's fees as hereinbefore recommended should be deducted from each of their shares of said escrow fund before payment to them of the amounts then due them therefrom; and that if the option to purchase Parcel 'B' herein after referred to is exercised by the said JOHN F. QUINN the commission thereon will be due to the said F. THOMAS MORRIS and FRANK R. B. THOMAS, to be divided between them in equal proportions.

"That Quinn's claim for a commission from the sellers on the theory that the sellers were unfair to him in selling through Morris and Quinn at a lower price than they quoted to Quinn is not tenable because Quinn is not the procuring cause of the sale.

"The defendant Quinn is not bound by the terms of the escrow because he signed the said agreement on the condition and with the understanding that it would not be binding upon him until and unless the plaintiff Thomas and defendant Morris signed said escrow, and said escrow was not signed by the defendant Morris. The defendant Quinn, however, is bound by the terms of the escrow because he has recognized the validity of the same by asking here for a decree against the funds so deposited in escrow.

"RECOMMENDATIONS

"That a decree be entered herein directing the said CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, escrowee, to deduct and retain for itself as its fees and expenses and costs as said escrowee, the sum of ONE HUNDRED FIFTY DOLLARS from said escrow fund of FIFTY-NINE DOLLARS; that the decree provide that in the event the option to purchase said Parcel 'B' herein referred to is exercised by the said JOHN F. QUINN, that the said F. THOMAS MORRIS and FRANK R. B. THOMAS are the brokers entitled to share in said commission equally.

"That the prayer of the said Frank D. Quinn and Robert S. Quinn for commission out of said escrow fund on the sale of Parcel 'A', or commission on the sale of Parcel 'B', should the option of John F. Quinn to purchase be exercised, be denied. \* \* \*

As heretofore stated the decree was entered in accordance with the recommendations of the master that the commission presently due and on deposit with the escrowee be paid in equal share to the plaintiff Thomas and the defendant Morris after deducting fees, costs and charges and that in the event that Quinn exercised his option to purchase the additional property Thomas and Morris were entitled to share equally the commission on the sale of that property.

The theory of the defendant Quinn, as stated in his brief, is "(a) That he was the procuring cause of the sale and the first to introduce the contracting parties. (b) That plaintiff Thomas



abandoned all efforts to sell the property long before the sale was consummated. (c) That the sellers cannot deprive him of his commission by completing the sale themselves or through Morris, another broker. (d) That, as an alternative theory, Quin contends he is entitled to a judgment in the amount of \$3,900 upon his counterclaim against the sellers."

Plaintiff's theory is that "he and defendant Morris agreed to work together to effect the sale of the suburban farm to Mr. Cuneo; that through their joint efforts the property was sold to Mr. Cuneo; \*\*\* that commissions payable by the owners in respect of the sale are properly payable to plaintiff and defendant Morris;" and "that the evidence clearly supports the findings of the Master; that the exceptions to the Master's report were properly overruled by the Chancellor, and that the decree entered by the Chancellor was in all respects proper."

The theory of the defendant Morris in the trial court was that Thomas had originally negotiated with Cuneo at Morris's suggestion and request but had subsequently abandoned all efforts to close the sale and only reappeared and claimed a right to the commission after Morris had negotiated directly with Cuneo and the owners of the property and brought about the sale.

At the outset we will consider Quin's contention that he "is entitled to his commissions even though Thomas and Morris were the procuring cause of the sale." He states in his brief that "he filed a counterclaim in which he asked a judgment for the amount of the commissions due him against the trustees or owners of the property." A careful examination of his counterclaim reveals that it does not ask for any direct relief against the trustee owners of the property, who were his codefendants. No such relief having been prayed for against said trustees in Quin's counterclaim, the court was without authority to grant it. That Quin's counterclaim was



abandoned all efforts to sell the property long before the sale was consummated. (c) That the sellers cannot deprive him of his commission by completing the sale themselves or through Morris, another broker. (d) That, as an alternative theory, Quinn contends he is entitled to a judgment in the amount of \$3,900 upon his counterclaim against the sellers."

Plaintiff's theory is that "he and defendant Morris agreed to work together to effect the sale of the suburban farm to Mr. Quinn; that through their joint efforts the property was sold to Mr. Quinn; \* \* \* that commissions payable by the owners in respect of the sale are properly payable to plaintiff and defendant Morris;" and "that the evidence clearly supports the findings of the Master; that the exceptions to the Master's report were properly overruled by the Chancellor, and that the decree entered by the Chancellor was in all respects proper."

The theory of the defendant Morris in the trial court was that Thomas had originally negotiated with Quinn at Morris's suggestion and request but had subsequently abandoned all efforts to close the sale and only reappeared and claimed a right to the commission after Morris had negotiated directly with Quinn and the owners of the property and brought about the sale.

At the outset we will consider Quinn's contention that he "is entitled to his commissions even though Thomas and Morris were the procuring cause of the sale." He states in his brief that "he filed a counterclaim in which he asked a judgment for the amount of the commissions due him against the trustees or owners of the property." A careful examination of his counterclaim reveals that it does not ask for any direct relief against the trustee owners of the property, who were his co-defendants. No such relief having been prayed for against said trustees in Quinn's counterclaim, the court was without authority to grant it. That Quinn's counterclaim was

not directed against the trustee owners is clearly in his failure to secure a rule on them to answer said counterclaim and by the fact that they did not answer it and he secured no default against them for want of an answer. No issue was raised or tried in this cause except the right of the several brokers to receive or share in the funds on deposit representing the commission on the sale of the property and the determination of that issue also determined who was entitled to receive the additional commission of \$4,500, if Cuneo exercised his option to purchase the adjacent property. Quin must be held to have become bound by the terms of the escrow agreement under which the commission presently due was deposited, inasmuch as he filed a counterclaim herein praying that the commission so deposited be turned over to him. We are impelled to hold that Quin had no right to direct relief against the trustee sellers and that any right he might have to relief is restricted to the commission deposited in escrow.

Is Quin entitled to receive or share in the commission deposited in escrow by the sellers?

In our opinion the findings, conclusions and recommendations of the master are amply supported by the evidence. The salient facts disclosed by the evidence are that the defendant Morris, who learned that Cuneo might be interested in the purchase of the Insull property and who did not want to approach him personally in connection with same, because he (Morris) was working with Cuneo on another deal, contacted plaintiff Thomas to the end that the latter would endeavor to sell the Insull farm to Cuneo; that Thomas and Morris entered into an agreement that in the event Cuneo purchased the property through them they would share the commission on the sale equally; that of the brokers involved herein Thomas was the first to bring the property to Cuneo's attention and he did so May 4, 1935; that thereafter he



not directed against the trustee owners is clearly in his failure to secure a rule on them to answer said counterclaim

and by the fact that they did not answer it and he secured no default against them for want of an answer. No issue was raised or tried in this cause except the right of the several brokers

to receive or share in the funds on deposit representing the commission on the sale of the property and the determination of that issue also determined who was entitled to receive the

additional commission of \$4,500, if Gunno exercised his option to purchase the adjacent property. Gunno must be held to have become bound by the terms of the escrow agreement under which

the commission presently due was deposited, inasmuch as he filed a counterclaim herein praying that the commission so deposited be turned over to him. We are impelled to hold that Gunno had no

right to direct relief against the trustee sellers and that any right he might have to relief is restricted to the commission deposited in escrow.

Is Gunno entitled to receive or share in the commission

deposited in escrow by the sellers?

In our opinion the findings, conclusions and recommendations

of the master are amply supported by the evidence. The

salient facts disclosed by the evidence are that the defendant

Morris, who learned that Gunno might be interested in the purchase of the Insull property and who did not want to approach him

personally in connection with same, because he (Morris) was

working with Gunno on another deal, contacted plaintiff Thomas

to the end that the latter would endeavor to sell the Insull

farm to Gunno; that Thomas and Morris entered into an agreement

that in the event Gunno purchased the property through them they

would share the commission on the sale equally; that of the brokers

involved herein Thomas was the first to bring the property to

Gunno's attention and he did so May 4, 1935; that thereafter he



showed the property to Cuneo, introduced him to at least the sellers and their agent and manager of the property and submitted to said sellers proposals to purchase made by Cuneo, which were rejected; that through visits to Cuneo's office, correspondence with him and by means of the telephone Thomas continued his efforts over a long period of time to sell Cuneo the Insull farm; that no broker was granted an exclusive agency to sell the property; that while Thomas was still negotiating with Cuneo, Quin met the latter for the first time in the Fall of 1935; that thereafter Quin persistently endeavored to bring about the sale of the property but without success; that several proposals or purchases submitted by Cuneo through Quin were rejected; that Cuneo was interested in the property and anxious to purchase same after it was called to his attention but not at the price demanded by the sellers; that no progress was made by any of the brokers in negotiating the sale of the property until June, 1937, when through the instrumentality of Morris a meeting of the principals was arranged; and that at that meeting, which was also attended by Morris, the sale of the property to Cuneo was consummated at a price which represented a substantial reduction from the price theretofore listed with both Thomas and Quin.

Thus we have this situation presented. None of the brokers had an exclusive agency to sell the property. While Thomas was not personally the procuring cause of the sale, it is undisputed that it was he who first brought the property to the purchaser's attention and that thereafter he worked diligently to sell the property to him. Then Quin contacted Cuneo about six months later in connection with the property in question and used his utmost efforts to bring about the sale, persisting in such efforts until the sale was consummated through the instrumentality of Morris. It may well be that Quin could have effected the sale if he had been permitted to do so upon the same terms at which Cuneo finally purchased the property. But Quin is in no better position in that regard than Thomas. In all

showed the property to Gunno, introduced him to at least the sellers and their agent and manager of the property and admitted to said sellers proposals to purchase made by Gunno, which were rejected; that through visits to Gunno's office, correspondence with him and by means of the telephone Thomas continued his efforts over a long period of time to sell Gunno the small farm; that no broker was granted an exclusive agency to sell the property; that while Thomas was still negotiating with Gunno, Gunno met the latter for the first time in the fall of 1937; that thereafter Gunno persistently endeavored to bring about the sale of the property but without success; that several proposals or purchases submitted by Gunno through him were rejected; that Gunno was interested in the property and anxious to purchase same after it was called to his attention but not at the price demanded by the sellers; that no progress was made by any of the brokers in negotiating the sale of the property until June, 1937, when through the instrumentality of Morris a meeting of the principals was arranged; and that at that meeting, which was also attended by Morris, the sale of the property to Gunno was consummated at a price which represented a substantial reduction from the price theretofore listed with both Thomas and Gunno. Thus we have this situation presented. None of the brokers had an exclusive agency to sell the property. While Thomas was not personally the procuring cause of the sale, it is undisputed that it was he who first brought the property to the purchaser's attention and that thereafter he worked diligently to sell the property to him. Then Gunno contacted Gunno about six months later in connection with the property in question and used his utmost efforts to bring about the sale, persisting in such efforts until the sale was consummated through the instrumentality of Morris. It may well be that Gunno could have effected the sale if he had been permitted to do so upon the same terms at which Gunno finally purchased the property. But Gunno is in a better position in that regard than Thomas. In all



likelihood he also could have made the sale to Cuneo at the reduced price.

In our opinion the feature of this case which is of controlling importance is the arrangement made between Thomas and Morris, whereby they agreed to work together to effect the sale to Cuneo. This arrangement was clearly established. Thomas was the broker who first brought the property to the attention of the purchaser, who never thereafter lost interest in it and Morris was the broker, through whose instrumentality the sale was made. "An agreement between brokers co-operating in the sale of land for the division of fees, is not illegal nor against public policy, and it will be construed and enforced the same as other contracts." Nelson on Law of Real Estate Brokerage, 2d Ed., Sec. 144, p. 262; West v. Visalia Abstract Co., 53 Cal. App. 467, 200 Pac. 351.

Defendant Quin strenuously urges that plaintiff Thomas abandoned his negotiations with Cuneo for the sale of the property. There was a conflict in the evidence in this regard, which the master resolved in favor of Thomas, and we think that he was warranted in so doing.

Defendant Quin contends that there is no allegation in plaintiff's complaint to support the finding that the joint efforts of Thomas and Morris were the procuring cause of the sale. We are of opinion that the allegations of the complaint are sufficiently broad to support said finding.

Just what is Quin's position? He was not the first broker who directed Cuneo's attention to the property. He was not the only broker who opened and continued negotiations with Cuneo for the purchase of the property. He was not the broker through whose instrumentality the sale to Cuneo was consummated. He did not earn his commission because he did not



likelihood he also could have made the sale to Gunno at the reduced price.

In our opinion the feature of this case which is of controlling importance is the arrangement made between Thomas and Morris, whereby they agreed to work together to effect the sale to Gunno. This arrangement was clearly established.

Thomas was the broker who first brought the property to the attention of the purchaser, who never thereafter lost interest in it and Morris was the broker, through whose instrumentality the sale was made. "An agreement between brokers co-operating

in the sale of land for the division of fees, is not illegal nor against public policy, and it will be construed and enforced

the same as other contracts." Nelson on Law of Real Estate

Brokers, 2d Ed., Sec. 144, p. 262; West v. Visalia Abstract Co., 53 Cal. App. 467, 200 Pac. 351.

Defendant Gunno strenuously urges that plaintiff Thomas

abandoned his negotiations with Gunno for the sale of the property. There was a conflict in the evidence in this regard, which the master resolved in favor of Thomas, and we think that he was warranted in so doing.

Defendant Gunno contends that there is no allegation in

plaintiff's complaint to support the finding that the joint efforts of Thomas and Morris were the proximate cause of the sale. We are of opinion that the allegations of the complaint are sufficiently broad to support said finding.

Just what is Gunno's position? He was not the first broker who directed Gunno's attention to the property. He was not the only broker who opened and continued negotiations with Gunno for the purchase of the property. He was not the broker through whose instrumentality the sale to Gunno was consummated. He did not earn his commission because he did not

produce a purchaser. He came near doing so, but he did not. Under the circumstances he was not wronged - he was only unfortunate.

In discussing the question of intervening brokers in Nelson on Law of Real Estate Brokerage, supra, the author makes this statement at p. 203: "It would be at variance with all practical rules, to require the party selling to pronounce, under penalty of paying double commissions, upon the metaphysical question, which agent, under the circumstances, was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent through whose instrumentality the sale was carried to a successful conclusion is the procuring cause thereof."

In so far as the evidence and its weight and the credibility of the witnesses is concerned, the rule enunciated in Pasedech v. Auw, 364 Ill. 491, is applicable here. There the court said at p. 496

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Keuper v. Mette, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 id. 98."

Since the joint efforts of plaintiff Thomas and defendant Morris were the procuring cause of the sale, they are entitled to share equally in the commission deposited in escrow and the additional commission due from the sellers in the event that Cuneo exercised his option to purchase the adjacent parcel of land.

The decree of the Circuit court is affirmed.

DECREE AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

Under the circumstances he was not wronged - he was only unfairly treated. He came near doing so, but he did not produce a purchaser. He came near doing so, but he did not.

In discussing the question of intervening brokers in Nelson on law of Real Estate Brokerage, supra, the author makes this statement at p. 203: "It would be at variance with all practical rules to require the party selling to pronounce, under penalty of paying double commissions, upon the metaphysical question, which agent, under the circumstances, was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent through whose instrumentality the sale was carried to a successful conclusion is the procuring cause thereof."

In so far as the evidence and its weight and the credibility of the witnesses is concerned, the rule enunciated in Paschall v. Allen, 364 Ill. 491, is applicable here. There the court said at p. 492

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Herger v. Meier, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. (North Side Gas and Coal Co. v. Hecht, 295 Ill. 515; Kiekamp v. Kiekamp, 275 Ill. 98.")

Since the joint efforts of plaintiff Thomas and defendant Morris were the procuring cause of the sale, they are entitled to share equally in the commission deposited in escrow and the additional commission due from the sellers in the event that Cunniff exercised his option to purchase the adjacent parcel of land. The decree of the Circuit court is affirmed.

D. C. R. W. T. H. R. D.



42136

SHORE MANAGEMENT CORPORATION,  
Appellee,

v.

ARTHUR ERICKSON and ANTHONY  
ERICKSON, doing business as  
C. A. ERICKSON BROS.,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

314 I.A. 571

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Shore Management Corporation, was organized as an Illinois stock corporation on October 10, 1930. It was dissolved by decree of the Superior court June 21, 1934 for failure to file its annual report and to pay its franchise tax and that decree has not been vacated. On October 30, 1935, more than fourteen months after its dissolution, Shore Management Corporation caused a judgment by confession for \$1,679.28 to be entered upon four notes against the defendants, Arthur Erickson and Anthony Erickson, the makers of the notes. The Shore Management Corporation had received these notes by assignment but it does not appear when it became the owner thereof. Subsequent to the entry of the judgment by confession, plaintiff instituted several garnishment proceedings based on said judgment, upon which it collected \$473.75. The original judgment was satisfied to this extent, On June 6, 1936 plaintiff instituted a garnishment proceeding against Ray W. Summe & Co., in which it was claimed that said garnishee was indebted to defendants. On June 16, 1936, defendants filed a verified petition to vacate the judgment by confession, alleging therein that they had been apprised of the garnishment summons issued and served upon Summe & Co.; that that was their first notice that the judgment by confession had been entered against them; that plaintiff corporation having been dissolved on June 21, 1934, it was not a legal entity when this action was brought on October 30, 1935; and that it therefore had no capacity to sue.

SHORE MANAGEMENT CORPORATION,  
Appellee,

APPEAL FROM MUNICIPAL

COURT OF CHICAGO,

ARTHUR ERICKSON and ANTHONY  
ERICKSON, doing business as  
C. A. ERICKSON BROS.,  
Plaintiffs.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Shore Management Corporation, was organized

as an Illinois stock corporation on October 10, 1930. It was

dissolved by decree of the Superior Court June 21, 1934 for

failure to file its annual report and to pay its franchise tax  
and that decree has not been vacated. On October 30, 1935, more

than fourteen months after its dissolution, Shore Management

Corporation caused a judgment by confession for \$1,679.28 to be

entered upon four notes against the defendants, Arthur Erickson  
and Anthony Erickson, the makers of the notes. The Shore Manage-ment Corporation had received these notes by assignment but it  
does not appear when it became the owner thereof. Subsequent to

the entry of the judgment by confession, plaintiff instituted

several garnishment proceedings based on said judgment, upon

which it collected \$473.77. The original judgment was satisfied

to this extent. On June 6, 1936 plaintiff instituted a garnishment

proceeding against Ray W. Gurne &amp; Co., in which it was claimed that

said garnishee was indebted to defendants. On June 16, 1936, defend-

ants filed a verified petition to vacate the judgment by confession,

alleging therein that they had been apprised of the garnishment

summons issued and served upon Gurne &amp; Co.; that that was their

first notice that the judgment by confession had been entered

against them; that plaintiff corporation having been dissolved on

June 21, 1934, it was not a legal entity when this action was brought

on October 30, 1935; and that it therefore had no capacity to sue.



On September 4, 1936, pursuant to an agreed order to that effect, defendants' petition to vacate the judgment by confession was withdrawn. It does not appear why said petition was withdrawn. On April 3, 1941, plaintiff instituted a supplemental citation proceeding in this cause for the appearance and examination under oath of the defendants and a supplemental defendant, C. A. Erickson, concerning the property of said defendants. Thereupon, on April 29, 1941, defendants filed a verified petition "to vacate, set aside and hold for naught the judgment entered herein on October 30, 1935, and, by the order of this Court, to abate and dismiss the plaintiff's suit herein and to quash all outstanding process issued on said judgment," which motion alleged "that there is not now nor was there at the time and date of the commencement of this suit and the entry of the judgment by confession herein any such corporation as the Shore management Corporation, as by the statement of claim filed herein and by the above action is supposed; and that, if such Shore Management Corporation ever existed, it was dissolved by proceedings had in the Superior court of Cook county, Illinois, on, to-wit, June 21, 1934, in chancery, Case No. 68438, and which proceedings have not since been vacated, set aside or reversed, but remain in full force and effect." On September 19, 1941 an order was entered by the trial court denying defendants' motion to vacate the judgment entered by confession. Defendants prosecute this appeal from said order.

Defendants' theory as stated in their brief is as follows:

"That the dissolution proceedings of the Shore Management Corporation, the alleged and pretended plaintiff, by the Attorney General of the State of Illinois, had put an end to its existence so that at the time of the filing of the action it had no capacity to sue nor to maintain the prosecution of a suit in any manner whatsoever, including the bringing and prosecution of the supplemental proceedings which was in the nature of a creditor's suit and a new action. There could



On September 4, 1936, pursuant to an agreed order to that effect, defendants' petition to vacate the judgment by confession was drawn. It does not appear why said petition was withdrawn. On April 3, 1941, plaintiff instituted a supplemental citation proceeding in this cause for the appearance and examination under oath of the defendants and a supplemental defendant, C. A. Wickson, concerning the property of said defendants. Thereupon, on April 29, 1941, defendants filed a verified petition "to vacate, set aside and hold for naught the judgment entered herein on October 30, 1935, and, by the order of this Court, to abate and dismiss the plaintiff's suit herein and to quash all outstanding process issued on said judgment," which motion alleged "that there is not now nor was there at the time and date of the commencement of this suit and the entry of the judgment by confession herein any such corporation as the Shore Management Corporation, as by the statement of claim filed herein and by the above action is supposed; and that, if such Shore Management Corporation ever existed, it was dissolved by proceedings had in the Superior Court of Cook County, Illinois, on to-wit, June 21, 1934, in chambers, Case No. 68438, and which proceedings have not since been vacated, set aside or reversed, but remain in full force and effect." On September 19, 1941 an order was entered by the trial court denying defendants' motion to vacate the judgment entered by confession. Defendants present this appeal from said order. Defendants' theory as stated in their brief is as follows: "That the dissolution proceedings of the Shore Management Corporation, the alleged and pretended plaintiff, by the Attorney General of the State of Illinois, had put an end to its existence so that at the time of the filing of the action it had no capacity to sue nor to maintain the prosecution of a suit in any manner whatsoever, including the bringing and prosecution of the supplemental proceedings which was in the nature of a creditor's suit and a new action. There could

be no officers, directors, representatives or agents to employ attorneys to institute and prosecute suits, collect judgment, receive payment and enter satisfaction thereof."

There can be no question but that plaintiff, Shore Management Corporation, had no legal capacity to sue after its dissolution on June 21, 1934. When it instituted this action on October 30, 1935, it lacked such capacity. The General Corporation act of 1919 provided for the survival of actions by and against a dissolved corporation for two years after its dissolution. That act (par. 14, sec. 14, chap. 32, Cahill's Ill. Rev. Stat. 1927) provided:

"All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

When the Business Corporation act was enacted in 1933, it expressly repealed the old Corporation act of 1919. Section 167 of the act of 1933 (par. 157.167, chap. 32, Ill. Rev. Stat. 1937) provides:

"Repeal. The act entitled 'An Act in Relation to Corporations for Pecuniary Profit,' approved June 28, 1919, in force July 1, 1919, as amended, is hereby repealed."

The section of the Business Corporation act of 1933 dealing with "Survival of Remedy After Dissolution" (par. 157.94, sec. 94, chap. 32, Ill. Rev. Stat. 1937) is as follows:

"The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name."

It will be noted that the provisions of the foregoing section 94 permit actions to be brought against a dissolved corporation, its directors or shareholders within two years after its dissolution on



be no officers, directors, representatives or agents to employ attorneys to institute and prosecute suits, collect judgment, receive payment and enter a satisfaction thereon."

There can be no question but that plaintiff, Shore Management Corporation, had no legal capacity to sue after its dissolution on June 21, 1934. When it instituted this action on October 30,

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It will be noted that the provisions of the foregoing section 94 permit actions to be brought against a dissolved corporation, its directors or shareholders within two years after its dissolution on



any liability incurred prior to its dissolution, but that there is no provision in that section of the Business Corporation act of 1933 which permits a dissolved corporation to bring actions after its dissolution. It is the general rule that after a corporation is dissolved it is incapable of maintaining an action in the absence of statutory authority. In American Exchange Bank v. Mitchell, 179 Ill. App.<sup>612</sup>, the court said at p. 615:

"There are at least two errors appearing in this record, each of which is conclusive against the defendant in error, and must work a reversal of this case. The first arises from the want of a plaintiff with capacity to maintain the suit.

"In all civil actions the prime requisite as to parties is that the plaintiff and the defendant must each be either a natural or artificial person.

"A civil action can be maintained only in the name of a person in law, an entity which the law of the forum can recognize as capable of possessing and asserting a right of action." Ency. Pleading and Practice, Vol. 15, p. 1478.

"After a corporation is dissolved it is incapable of maintaining an action. All action by a corporation which is pending when such corporation is dissolved abates upon such dissolution in the absence of a statute to the contrary. Ency. Pleading and Practice, vol. 5, p. 96."

In Fletcher Cyclopedia Corporations, Permanent Edition, vol. 16, sec. 8142, the author makes this statement at p. 885:

"A corporation's capacity to sue and be sued terminates at common law when the corporation is legally dissolved. Thereafter proceedings may be prosecuted in equity to wind up the corporation and adjudicate the rights of creditors, but in the absence of statutory provisions to the contrary, no action of law can be maintained by or against it as a corporate body or in its corporate name. It is not amenable to process and is incapable of making an appearance or of authorizing an attorney to make an appearance in its behalf. An action pending by or against it at the time of dissolution ordinarily abates and cannot be prosecuted to judgment. A judgment rendered against a corporation before its dissolution ceases to exist absolutely can proceedings be maintained to set aside a judgment or decree in its favor, when it must be made a party to such proceedings."

In Billiard Table Mfg. Corp. v. First-Tyler Bank & T. Co., 16 Fed. Supp. 998 (U. S. District Court, N. D., W. Va.) the court said at p. 992:

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A judgment rendered against a corporation before its dissolution cannot be reviewed after its dissolution nor can a corporation cease to exist absolutely on proceedings be maintained to set aside a judgment or decree in its favor, when it must be made a party to such proceedings."

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Act, an Illinois corporation had the right and power to collect debts due it and to maintain suits in its corporate name for the same for a period of two years after its date of dissolution. Illinois Business Corporation Act of June 28, 1919, in force July 1, 1919, Laws Ill. 1919, p. 320, sec. 14 (Smith-Hurd Ill. Stats., c. 32, sec. 157.94 note). However, in the enactment of the 1933 Illinois Business Corporation Act this right and power was withdrawn by the Legislature by the omission of the former provisions from the new act. Illinois Business Corporation Act, in force July 13, 1933, sec. 94 et seq., Acts of General Assembly of State of Illinois 1933, at pages 308, 354 et seq. (Smith-Hurd Ill. Stats. c. 32, sec. 157.94 et seq.) In the 1933 act, upon application of any interested party, the assets of any corporation undergoing involuntary liquidation may be collected by the appointment of receivers to collect the same pending dissolution. Illinois Business Corporation Act, in force July 13, 1933, sections 86 and 87."

Even though the Shore Management Corporation had not been dissolved, it was precluded from instituting or maintaining this action against the defendants. Paragraph 157.142, section 142 of the Business Corporation act provides in part as follows:

"No corporation required to pay a franchise tax, license fee or penalty under this Act shall maintain any action at law or suit in equity until all such franchise taxes, license fees and penalties have been paid in full."

The record shows that plaintiff had not paid its franchise tax and under this positive prohibition of the statute it could not maintain any suit, either at law or in equity, as long as it was delinquent in such payment.

It seems clear that plaintiff, Shore Management Corporation, which was a dissolved corporation, had no right to bring this action. However, plaintiff insists that defendants are barred from questioning its right to bring this action against them because (1) the public policy of this state as established by the decisions of our courts of review gave it a common law action against defendants until the Statute of Limitations had run against its claim; (2) defendants are estopped by their conduct during the course of this litigation from challenging its capacity to sue; and (3) the filing of defendants' petition to vacate on June 16, 1936 on the same grounds as are asserted in their petition of April 29, 1941 to vacate the judgment by confession is res judicata of the latter petition.



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Even though the Short Management Corporation had not been dissolved, it was precluded from instituting or maintaining this

action against the defendants. Paragraph 17.142, section 142

of the Business Corporation act provides in part as follows:

"The corporation required to pay a franchise tax, license fee or penalty under this act shall maintain any action at law or suit in equity until all such franchise taxes, license fees and penalties have been paid in full."

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are estopped by their conduct during the course of this litigation from challenging its capacity to sue; and (3) the filing of defendants' petition to vacate on June 16, 1936 on the same grounds as

are asserted in their petition of April 29, 1941 to vacate the judgment by confession as res judicata of the latter petition.

There is no merit in plaintiff's first contention. The authorities heretofore cited show conclusively that a dissolved corporation has no common law right to maintain an action and that it can only do so by statutory grant of authority. The rule pertaining to the doctrine of public policy in this state has been repeatedly enunciated by our Supreme court. In Colgrove v. Lowe, 343 Ill. 360, the court said at p. 362: "There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. The public policy of a state or nation is to be found in its constitution and statutes, and when cases arise concerning matters upon which they are silent then in its judicial decisions and the constant practice of government officials. (Ziegler v. Illinois Trust and Savings Bank, 245 Ill. 180 and cases cited.)" While section 94 of the Business Corporation act makes no mention of a dissolved corporation's right to bring an action, the Legislature manifested its intention to withdraw such right by its express repeal of the old act and by its failure to include a provision for such remedy in the new act.

As to plaintiff's contention that defendants are estopped from challenging its capacity to bring this action, it is sufficient answer to state that since section 94 of the Business Corporation act conferred no authority on a dissolved corporation to sue and since section 142 of said act positively prohibited plaintiff from suing so long as it was delinquent in the payment of its franchise tax, the institution of this action did not bring before the court a party plaintiff over which it could have jurisdiction and nothing that defendants did or failed to do during the course of this litigation could confer jurisdiction on the court over the Shore Management Corporation as a party plaintiff where the court otherwise lacked such jurisdiction. "A civil action can be maintained only in the name of a person in law, an entity which the law of the forum can



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recognize as capable of possessing and asserting a right of action" and "if the suit is brought in a name which is that of neither a natural person, a corporation or a partnership, it is a mere nullity." 47 C. J., secs. 16 and 24. The Shore Management Corporation, having been dissolved, was no longer in existence in so far as its capacity to maintain this action is concerned. Therefore this entire proceeding, including the judgment by confession, is a mere nullity. In view of what has already been said, plaintiff's contention that defendants' petition to vacate of June 16, 1936 is res judicata of their later petition to vacate the judgment by confession is without merit. In any event since there was no determination of any issue presented by defendants' petition to vacate of June 16, 1936, said petition having been withdrawn, the doctrine of res judicata is inapplicable.

The motion heretofore made by defendants to strike plaintiff's appearance, its additional abstract of record and its brief and argument, which was reserved to hearing, is at this time denied.

We have given careful consideration to all the points urged and the authorities cited but in the view we take of this case we deem further discussion would serve no useful purpose.

For the reasons stated herein the order of the Municipal court of Chicago, from which this appeal is taken, is reversed and the cause is remanded with directions to sustain defendants' motion to vacate the judgment by confession, to quash all outstanding process issued in this cause and to dismiss this suit.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

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For the reasons stated herein the order of the Municipal Court of Chicago, from which this appeal is taken, is reversed and the cause is remanded with directions to sustain defendants' motion to vacate the judgment by confession, to erase all outstanding process issued in this cause and to dismiss this suit.

REVEREND AND HONORABLE THE DIRECTORS,  
Securian, P. L., and Friend, J., concur.

GEN. NO. 9745

AGENDA NO. 27

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A. D. 1942.

814 I.A. 571<sup>2</sup>

IN THE MATTER OF THE ESTATE OF MARY  
ELIZABETH MURR, deceased.

THELMA BOWMAN RODESEILER and  
ARGYLE BOWMAN,

Appellants,

vs.

JOHN CLEVELAND MURR, Executor  
of the Estate of Mary Elizabeth  
Murr, deceased.

Appellee.

APPEAL FROM CIRCUIT COURT  
DUPAGE COUNTY.

HUFFMAN - P.J.

Appellee is the executor of the estate of Mary Elizabeth Murr. She died on June 6, 1937, seized with a farm, a house and lot in the city of Naperville, together with certain personal property and securities. It appears that following the death of Mrs. Murr, the real estate was made the subject of a suit for partition, and that appellee purchased the same at the partition sale; that thereafter, by stipulation to which appellants were parties, it was provided and agreed that the rents accruing from the real estate



IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A. D. 1942.

3141.A.241

APPEAL FROM CIRCUIT COURT  
JUDSON COUNTY.

IN THE MATTER OF THE ESTATE OF MARY  
ELIZABETH MURR, deceased.

THELMA BOWMAN ROBERTS, et al.  
ARGYLE BOWMAN,

Appellants,

vs.

JOHN OLIVELAND MURR, Executor  
of the Estate of Mary Elizabeth  
MURR, deceased.

Appellee.

HUTTMAN - P. 1.

Appellee is the executor of the estate of Mary Elizabeth Murr. She died on June 6, 1937, seized with a house and lot in the city of Naperville, together with certain personal property and securities. It appears that following the death of Mrs. Murr, the real estate was made the subject of a suit for partition, and that appellee purchased the same at the partition sale; that thereafter, by stipulation to which appellants were parties, it was provided and agreed that the rents accruing from the real estate

subsequent to the death of Mrs. Murr, and prior to the date of sale for partition, should be taken by appellee and accounted for by him in his accounts as executor.

On March 20, 1941, appellee filed a report in the County Court of DuPage county, which reflected his acts and accounts as executor. In this report, pursuant to the stipulation, he accounted for the rents collected from the real estate from the date of the death of Mrs. Murr to the date of the sale thereof in partition. In this report he took credit for certain payments made during such time for maintenance, repairs and taxes on the land involved. It appears that he reported a total amount of \$1650 collected in rents during such period, and took credit for \$480.96 for money expended for the purpose of maintenance and upkeep of the city house, the farm and farm buildings. His report also showed the allowance of a claim in his favor against the estate, of \$1467.97, under date of February 23, 1939.

On March 27, 1941, appellants filed objections in the County Court to the items of appellee's report, with respect to the sums expended for maintenance, repair and upkeep to the farm and the house in Naperville, and to the allowance of his claim against the estate. The County Court denied all of the objections, approved and confirmed the report as filed. The objectors there (appellants here) appealed to the Circuit Court of DuPage county, where the objections were again overruled and the report approved. This appeal follows from the judgment and decree of the Circuit Court approving appellee's report.

subsequent to the death of Mr. Hart, and prior to the date of his  
for partition, should be taken by executor and accounted for by him  
in his accounts as executor.

On March 27, 1941, executor filed a report in the County Court  
of DuPage County, which reflected his sale and accounts as executor.  
In this report, pursuant to his obligation, he accounted for the  
money collected from the real estate from the date of the death of  
Mrs. Hart to the date of the sale thereof in partition. In this re-  
port he took credit for certain payments made during such time for  
maintenance, repairs and taxes on the land involved. It appears  
that he reported a total amount of \$1582.95 collected in such selling  
such period, and took credit for \$480.95 for money expended for the  
purpose of maintenance and repairs of the city house, the farm and  
farm buildings. His report also showed the allowance of a claim in  
his favor against the estate, of \$1457.07, under date of February 27,  
1939.

On March 27, 1941, executor filed objections in the County Court  
to the items of executor's report, with respect to the sum expended  
for maintenance, repairs and repairs to the farm and the house in DuPage  
ville, and to the allowance of his claim against the estate. The  
County Court denied all of the objections, reviewed and confirmed the  
report as filed. The objections there (summarized here) were made in  
the Circuit Court of DuPage County, where the objections were again  
overruled and the report affirmed. The record follows from the  
Judgment and decree of the Circuit Court approving executor's report.



Appellants urge for reversal that the Court erred in approving the report and in overruling their objections thereto. The assignment of error is most general. Only two witnesses testified, appellee and a Mr. Friedrich. They both testified on behalf of appellee. There was no cross examination of either witness. Therefore, the facts with respect to the items of expenditure made by appellee in and about the upkeep and repair of the premises during the years involved, are not in dispute. The stipulation between the parties growing out of the partition suit provided that appellee should take such rents and make his accounting therefor to the other children in his account as executor. It appears that this is what he did. The trial court evidently considered that under the stipulation, appellee took the rents and looked after the property as a co-tenant, rather than as executor of the estate acting in an official capacity. The evidence supports the position of the trial court in this regard. Appellants in their argument urge that the Court erred in sustaining the claim allowed appellee in the County Court because he failed to prove the validity thereof in the present hearing in the Circuit Court. There is nothing in this record which in any way tends to impugn the validity or propriety of the claim as allowed in the County Court. It was allowed in that Court on February 23, 1939. No appeal was ever taken from the order allowing the claim, and nothing appears to show that any action was pending against the claim for fraud, collusion or mistake in connection with the allowance thereof. Appellee testified with regard to the collection of the rents following the death of his mother, and the items expended therefrom for repairs and main-

Appellate were for reversal that the Court erred in assuming  
the report and in overruling their objection thereto. The reason-  
ment of error is most general. One witness testified, appellee  
and Mr. Tinsley. They both testified on behalf of appellee.  
There was no cross examination of either witness. Therefore, the  
facts with respect to the issue of exoneration were by appellee in  
and about the upshot and result of the evidence during the year in-  
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court evidently considered that under the situation, appellee took  
the rent and looked after the property as a co-tenant, rather than as  
executor of the estate acting in an official capacity. The witnesses  
support the position of the trial court in this regard. Appellants  
in their argument urge that the Court erred in sustaining the claim  
alluded to in the County Court because he failed to prove the  
validity thereof in the present hearing in the Circuit Court. There  
is nothing in this record which in any way tends to throw the valid-  
ity or propriety of the claim as allowed in the County Court. It  
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taken from the order allowing the claim, and nothing appears to show  
that any action was pending against the claim for fraud, collusion  
or mistake in connection with the allowance thereof. Appellee testi-  
fied with regard to the collection of the rents following the death  
of his mother, and the items expended therefrom for repairs and main-

tenance to the property, exhibiting receipts for such expenditures.

It does not appear here that the correctness or propriety of the accounts as reflected by the appellee's report are in any way attacked. Mere formal objections were filed thereto, which two courts have heard and denied.

We are not disposed to disturb the judgment herein.

Judgment affirmed.



reference to the property, exhibiting receipt for such expenditures.  
It does not appear here that the correctness or propriety of  
the accounts as reflected by the appellee's report are in any way  
attacked. Where formal objections were filed thereto, which the  
courts have heard and denied.  
We are not disposed to disturb the judgment herein.

Judgment affirmed.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

314 I.A. 572<sup>1</sup>

FEBRUARY TERM, A.D. 1942

EDWARD C. DWYER AND PAULINE  
ROSE DWYER, husband and wife,  
et al.,

Appellées

vs.

VILLAGE OF GLEN ELLYN,

Appellant

APPEAL FROM  
CIRCUIT COURT  
OF DU PAGE COUNTY.

DOVE, J.:

Edward C. Dwyer and Pauline Rose Dwyer, his wife, Jacob A. Nelson and Anny S. Nelson, his wife, and Constance A. Sevland, are the respective owners of three contiguous tracts of land outside the village of Glen Ellyn, in close proximity to the north corporate boundary. They brought an action in the circuit court of DuPage County against the village for damages to their respective premises on account of the overflow thereof, and for an injunction restraining the continuance of such overflow. Upon a trial by the court without a jury, judgment against the village for \$1250.00 in favor of the Dwyers, and in favor of the village against the other plaintiffs, was entered, and the injunction was denied. The village has appealed from that part of the judgment against it. A cross appeal from that part of the judgment against the other plaintiffs and denying the injunction, was filed, but is not argued in this court, and no grounds for the cross appeal appear in appellee's brief, which concludes by urging that the judgment be affirmed. This leaves for

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consideration the questions relating only to the judgment in favor of the Dwyers.

The northwest portion of the village is bounded on the west by the Kay farm, and on the north by Geneva Road which runs east and west. The Sevland tract lies on the north side of Geneva Road. The west corporate boundary of the village is about opposite the center of the south line of the Sevland tract, which is bounded on the west by Bloomingdale road. The Nelson tract lies immediately north of the Sevland tract, and is of the same width east and west. The Dwyer tract is immediately east of the Nelson tract, the south line of the two tracts being a straight line. South of the Dwyer tract is another tract of the same width east and west and extending south to Geneva Road, a distance of about sixty rods. The Kay farm is the highest point in the vicinity. From there the land slopes to the east and then north to the premises of the plaintiffs. There is a depression which starts some distance south of Geneva Road, running northerly to a culvert across the road, and from thence north-westerly through the tract south of the Dwyer premises, to the south-west corner of the latter, and then continues north-westerly through the Nelson tract, emerging on Bloomingdale Road. The water going down this depression eventually reaches the DuPage River. The lowest part of the Dwyer premises is in the south-west corner thereof. They installed a twelve-inch tile down the depression, on their land, and paid half the cost of the tile through the Nelson tract. They also had three other lines of tile on their tract, one along the south side, one through the center and one to the northeast. Prior to the paving of Kenilworth Avenue and the installation of the storm sewers herein-after mentioned this system of tile furnished adequate drainage for their premises so that no water stood thereon after a heavy rain. There is a well defined open ditch down the depression as far as the Dwyer land. The northwest portion of the village was formerly the Burrell farm, adjoining the east line of the Kay farm. Kenilworth

consideration the questions relating only to the location in town  
of the Deyers.

The northwest portion of the village is bounded on the east by  
the New River, and on the north by Cedar Road which runs east and  
west. The eastern tract lies on the north side of Cedar Road, and  
west corporate boundary of the village is about opposite the corner  
of the south line of the eastern tract, which is bounded on the east  
by Washington Road. The eastern tract lies about half north of the  
eastern tract, and is of the same width east and west. The Deyers tract  
is immediately east of the eastern tract, the south line of the two  
tracts being a straight line. South of the Deyers tract is another tract  
of the same width east and west and extending south to Cedar Road,  
distance of about sixty rods. The Deyers tract is the largest tract in the  
vicinity. From there the land extends to the east and then north to the  
vicinity of the Deyers tract. There is a depression with some water  
distance south of Cedar Road, running westerly to a culvert across the  
road, and from thence north-westerly through the tract south of the  
Deyers tract, to the south-east corner of the tract, and then continuing  
north-westerly through the eastern tract, westerly to Washington Road.  
The water being a low depression extending westerly across the Deyers River.  
The lowest part of the Deyers tract is in the north-east corner thereof.  
They installed a twelve-inch tile from the depression, on their land,  
and paid half the cost of the tile through the eastern tract. They also  
had three other lines of tile on their tract, one along the north side,  
one through the center and one to the south. Prior to the placing  
of the tile the water and the installation of the water system was  
at a considerable expense of the Deyers tract. The Deyers tract  
their practice as that to enter the Deyers tract with a heavy rain.  
There is a well defined open ditch east of the depression as far as the  
Deyers tract. The northwest portion of the village was formerly the  
Deyers tract, adjoining the west line of the New River, Hamilton

Avenue in the village runs north and south, intersecting the south side of Geneva Road at a point about two hundred feet west of the culvert mentioned. Elm Street, Oak Street, Marion Street and other streets run east from Kenilworth Avenue to Western Avenue, in the above order south of Geneva Road. There are no streets west of Kenilworth Avenue. There is a sanitary sewer on each of the above named east and west streets, connected to an eight inch sanitary sewer in Western Avenue. The flow of these Elm Street and Marion Street sewers is all to the east. On Oak Street the flow from the largest part of the sanitary sewer is to the west connecting with the sanitary sewer on Kenilworth Avenue. The flow from the east end of the Oak Street sewer goes east to Western Avenue. The sanitary sewer on Kenilworth Avenue starts at Geneva Road and the flow from that point is south to Elm Street. South of Elm Street the flow of the Kenilworth Avenue sanitary sewer is to the north, so that the Elm Street sanitary sewer is designed to take all the sewage from that neighborhood, except what goes east on Marion Street and the east end of Oak Street. The Elm Street sanitary sewer is a ten inch sewer. The Kenilworth Avenue sanitary sewer is a ten inch sewer north of Oak Street and eight inches south of Oak Street; and the west end of the Oak Street sanitary sewer is an eight inch sewer.

In 1926 the village paved Kenilworth Avenue to Geneva Road and installed storm sewers thereon connecting with storm sewers running east on Elm Street and Oak Street to points near the ditch mentioned, and on Marion Street and Linden Street short distances. The Kenilworth Avenue storm sewer in this vicinity is a ten inch sewer, and runs to a twenty inch sewer on the south side of Geneva Road, which runs east to the culvert about 200 feet distant. The storm sewers on the east and west streets are eight inch sewers.

At a high point on the Kay farm, outside the village corporate limits is a swampy depression, which filled with water in times of heavy rainfall.



at a high point on the Kay farm, outside the village corporate limits is a swampy depression, which filled with water in times of heavy rainfall.

West streets are eight inch sewers.

The culvert about 200 feet distant. The storm sewers on the east and twenty inch sewer on the south side of Geneva Road, which runs east to Avenue starts at this vicinity is a ten inch sewer, and runs to the east on Union Street and Linden Street where it discharges. The Kenilworth east on Elm Street and Oak Street to points near the sites mentioned, installed storm sewers thirteen connecting with storm sewers running in 1926 the village paved Kenilworth Avenue to Geneva Road and is an eight inch sewer.

South of Oak Street and the west end of the Oak Street sanitary sewer south of Oak Street; and the west end of the Oak Street sanitary sewer is a ten inch sewer north of Oak Street and eight inches. The Kenilworth Avenue is a ten inch sewer. The Kenilworth Avenue that goes east on Union Street and the east end of Oak Street. The sewer is designed to take all the sewage from that neighborhood, except Avenue sanitary sewer is to the north, to take the Elm Street sanitary is south to the street. South of Elm Street the flow of the Kenilworth on Kenilworth Avenue starts at Geneva Road and the flow from that point the Oak Street sewer goes east to Western Avenue. The sanitary sewer sanitary sewer on Kenilworth Avenue. The flow from the east end of largest part of the sanitary sewer is to the west connecting with the Street sewers is all to the east. On Oak Street the flow from the sewer in Western Avenue. The flow of these Elm Street and Union named about and west streets, connected to an eight inch sanitary Kenilworth Avenue. There is a sanitary sewer on each of the above above street south of Geneva Road. There are no streets west of streets run east from Kenilworth Avenue to Geneva Avenue, in the culvert mentioned. The street, Oak Street, Union Street and other side of Geneva Road at a point about two hundred feet west of the Avenue in the village runs north and south, intersecting the south

The evidence shows that when the water in it reached a certain level it would flow west. Some years before the Burrell farm was taken into the village, a tile drain was installed leading from the depression across the Burrell farm across what is now Kenilworth Avenue, diagonally to the northeast, and ending so that the water found its way into the north and south ditch near Oak Street. When Kenilworth Avenue was paved the village connected this tile to the storm sewer on Kenilworth Avenue on the west side thereof.

One of the claims of the Dwyers is that prior to the paving of Kenilworth Avenue and the installing of the storm sewers mentioned, the water from the Northwest part of the village, including the water from the Kay farm, found its way to the ditch south of Geneva Road and thence through the culvert on down the ditch northwesterly; that a large part of the water was absorbed by sub-surface drainage, and their land was never flooded; that since the paving and storm sewers were installed, the water comes north on Kenilworth Avenue in such volume and force that it crosses Geneva Road at that point, and goes north to a point on the ditch about fifty feet south of the south line of the Dwyer tract, where it formed a whirlpool, cut away and around a ridge, washed out, broke and stopped the tile drain from thereon and made a lake of about five acres in the southwest corner of the Dwyer land. The evidence shows that the center of Geneva Road is about a foot higher than the north end of the pavement on Kenilworth Avenue. Another claim of the Dwyers is that in time of heavy rain, the sewage from the sanitary sewer system gets into the storm water system, and that feces and other offensive sewage comes down onto their premises with the flood water, causing additional damages.

The evidence shows that since the pavement and storm sewers were installed, in heavy rains a part of the water cuts across Geneva Road at the end of Kenilworth Avenue and goes directly north as claimed by the Dwyers, and has eroded a considerable part of the southwest corner of

The evidence shows that when the water in it reached a certain level it could flow west. Some years before the Drury farm was taken into the village, a tile drain was installed leading from the depression across the Drury farm across what is now Kenilworth Avenue, diagonally to the northeast, and ending so that the water could flow into the north and south ditch near Oak Street. When Kenilworth Avenue was paved the village connected this tile to the storm sewer on Kenilworth Avenue on the west side thereof.

One of the claims of the Dwyers is that prior to the paving of Kenilworth Avenue and the installing of the storm sewers mentioned, the water from the northwest part of the village, including the water from the Kay farm, found its way to the ditch south of Drury Road and thence through the culvert on down the ditch to the southwest; that a large part of the water was absorbed by sub-surface drainage, and that land was never flooded; that since the paving and storm sewers were installed, the water comes north on Kenilworth Avenue in such volume and force that it crosses Geneva Road at that point, and goes north to a point in the ditch about fifty feet south of the south line of the Drury tract, where it formed a whirlpool, cut away and around a ridge, washed out, broke and stopped the tile drain from thereon and made a lake of about five acres in the southwest corner of the Drury land. The evidence shows that the center of Geneva Road is about a foot higher than the north end of the pavement on Kenilworth Avenue. Another claim of the Dwyers is that in time of heavy rain, the sewage from the sanitary sewer system goes into the storm water system, and that trees and other obstructions come down onto their premises with the flood water, causing additional damages. The evidence shows that since the pavement and storm sewers were installed, in heavy rains a part of the water cuts across Geneva Road at the end of Kenilworth Avenue and goes directly north as claimed by the Dwyers, and has eroded a considerable part of the northwest corner of



their land; and that by the tile being washed out, broken and stopped up, the water stands on about five acres to a depth of from two to three feet and stays there sometimes from two to three months. It also shows that on several occasions the manhole cover on the storm sewer at the north end of Kenilworth Avenue has been forced off by the excessive flow of the water, which spouts out of the sewer.

Dwyer testified that since the storm sewers were installed he had replaced the tile on their premises eight or ten times. The evidence also shows that on two occasions the village has done the same thing and furnished new tile to replace the broken sections.

The former personnel director of the village, who acted in an advisory capacity on the sanitary sewers and the water system testified that when he received complaints as to the condition on the Dwyer property he and the superintendent of the water system found that two sloughs between Elm and Oak Streets connected with the sanitary sewer system and caused trouble about a mile away; that they connected the sanitary sewer into the storm sewer; that he had the material delivered and the water superintendent reported to him that the connection was made about three hundred feet east of Kenilworth and Oak, and that by taking the sanitary sewage on Oak Street back to Kenilworth Avenue, it goes onto the Dwyer property. He testified on cross examination that he did not see the work being done in installing the connection between the two sewer systems.

Allan A. Myers, the former president of the village, who lives on the southeast corner of Kenilworth Avenue and Geneva Road, testified his laundry tub, sink and toilet in the basement were connected with the Kenilworth Avenue sewer, and that his drain is connected into the ditch that runs into Geneva Road. That at different times in heavy rains, water, toilet paper and feces came into his basement through the drains, laundry tub and toilet, two or three times a year, varying in depth of from one

their land; and that by the tide being washed out, broken and up, the water stands on about five acres to a depth of three to three feet and stays there sometimes from two to three months. It also shows that on several occasions the manhole cover on the storm sewer at the north end of Kenilworth Avenue has been thrown off by the excessive flow of the water, which sprouts out of the sewer.

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to three feet; that it did not happen prior to the time he installed the toilet, and has not occurred within the last year or so.

A witness who lives on the south side of Geneva Road, east of the depression, testified his sewer runs south into the Elm Street sanitary sewer; that about twice a year the sewer backed up and sewage came into his basement; that on these occasions he broke his sewer about one hundred feet south of Geneva Road and relieved the pressure by letting the sanitary sewage run into the natural water course west of his house. He further testified that on the property across the road from his house there is an old fashioned cess pool, and he had noticed water shooting up from the tile south of the cess pool.

The municipal engineer who had charge of the construction of the pavement, the storm sewers and the sanitary sewers, testified the elevation of the sanitary sewer is below that of the storm sewer, detailing the difference in elevation at various points. At Kenilworth Avenue and Geneva Road the elevation of the sanitary sewer is 3/10 of a foot below that of the storm sewer. His son, and the superintendent of water and the sanitary sewers, testified they made tests to determine whether there was any connection between the sanitary and storm sewers, by closing the storm sewer at Kenilworth Avenue and Oak Street, flooding the pavement, and putting bluing into the storm sewer; and that they found no bluing in the effluent of the sanitary sewer but found it in the storm sewer.

It is common knowledge that sanitary sewer systems are sealed so that ground water does not ordinarily enter them, except slight infiltration by leaky joints. There is no testimony in this case to show it was sufficient in this case to cause flooding of the sanitary sewer in time of a heavy rain. Considering the testimony of the former personnel director that the two systems were connected together, and the



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He further testified that on the property across the road from his house there is an old fashioned cess pool, and he had noticed water shooting up from the tile south of the cess pool.

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It is common knowledge that sanitary sewer systems are sealed so that ground water does not ordinarily enter them, except slight infiltration by leaky joints. There is no testimony in this case to show it was sufficient in this case to cause flooding of the sanitary sewer in time of a heavy rain. Considering the testimony of the former personnel director that the two systems were connected together, and the

backing of the sewage into the two basements mentioned, together with the fact that the storm water sewer on Kenilworth Avenue was of such volume that it threw the cover off the mahole opposite the Myers house, the evidence shows the sewage from the sanitary sewer system was getting into the storm water sewer, and found its way down Kenilworth Avenue onto the Dwyer place, as the water raced north across Geneva Road.

The well settled rule is that the owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow pass off through the natural drains upon or over the lower or servient lands, and the right to drain his own land into the channel which nature has provided, even if the quantity of the water is thereby increased. (People ex rel. Peeler v. Chicago and Eastern Illinois Railroad Co., 262 Ill. 492; Lambert v. Alcorn, 144 Ill. 313; Ribordy v. Murray, 177 id. 134; Pinkstaff v. Steffy, 216 id. 406; Robb v. Village of LaGrange, 158 id. 21.) The same doctrine applies to a municipality having a dominant estate, so long as it does not cast sewage upon the servient estate. (Crane v. Village of Roselle, 236 Ill. 97; ~~Robb~~ v. Village of LaGrange, supra.) It is also the law that no landowner or proprietor of a dominant estate has any right to divert surface waters or flow of watercourses from their natural channel and thereby overflow land of another without compensating him for damages resulting from overflow; and the fact that waters diverted from the natural course so that they overflow the land of another are first conducted into a natural water course leading to or through lands damaged will not relieve the party causing the diversion from liability therefor if the waters cause the natural watercourse to overflow its banks to the damage of another landowner. (Eimers v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 158 Ill. App. 557.)

The contour map introduced in evidence by the appellant shows that

backing of the water into the storm water sewer, and the fact that the storm water sewer in Kenilworth Avenue was of such volume that it threw the cover off the manhole opposite the Wyer house, the evidence shows the sewer flows from the sanitary sewer system into the storm water sewer, and found its way down Kenilworth Avenue onto the Wyer place, as the water traced north across Geneva Road.

The well settled rule is that the owner of a higher tract of land has the right to have the surface water falling on naturally coming upon his premises by rains or melting snow pass off through the natural drains upon or over the lower or servient lands, and the right to drain his own land into the channel which nature has provided, even if the quantity of the water is thereby increased. (People ex rel. Taylor v. Chicago and East and West Railroad Co., 222 Ill. 423; Lambert v. Leorn, 124 Ill. 313; Ribordy v. Leorn, 127 Ill. 134; Piskars v. Leorn, 216 Ill. 406; Robb v. Village of Leorn, 128 Ill. 21.) The same doctrine applies to a municipality having a dominant estate, as long as it does not cause sewage upon the servient estate. (Curtis v. Village of Roselle, 223 Ill. 97; Robb v. Village of Leorn, 128 Ill. 21.) It is also the law that no landowner or proprietor of a dominant estate has any right to divert surface waters or flow of watercourses from their natural channel and thereby overflow land of another without compensating him for damages resulting from overflow; and the fact that water diverted from the natural course so that they overflow the land of another are first conducted into natural water courses leading to or through lands damaged will not relieve the party causing the diversion from liability therefor if the water causes the natural watercourses to overflow its banks to the damage of another landowner. (Harris v. Leorn, 127 Ill. 21; Leorn v. Leorn, 128 Ill. 21.) The content map introduced in evidence by the appellant shows that



the entire northwest portion of the village north of Oak Street declines east to the depression and ditch lying south of the culvert. From the culvert north the decline of the land is toward the north. While the village did not install the tile from the Kay farm, it did connect the tile into the Kenilworth Avenue sewer, diverting the flow of it from its natural course into the depression. All this water from Kenilworth Avenue north of Oak Street, and from the west portions of the cross streets mentioned and the Kay farm tile is sent north down Kenilworth Avenue out of its natural course, which is to the east. Inasmuch as the evidence shows the Dwyer land was never flooded prior to the installing of the pavement and the sewers, it is apparent that they are the cause of the flooding. The volume of the water is so great that neither the sewer on Kenilworth Avenue nor the twenty inch sewer of Geneva Road will carry it, and a large part of it cuts across the road and the intervening tract onto the Dwyer land with such force as to cause the damages complained of. In such a case the owner of the servient estate is entitled to recover. (Hicks v. Silliman, 93 Ill. 255.) Appellant is mistaken in the assumption that the Dwyer claim is based only on acceleration. It embraces damages from water diverted from its natural course.

Whenever a municipality diverts the flow of water from its natural course, it is liable for damages to the servient estate. (City of Bloomington v. Brokaw, 77 Ill. 194; Nevins v. City of Peoria, 41 id. 502; City of Aurora v. Gillett, 56 id. 132; City of Aurora v. Reed, 57 id. 29.) In City of Elgin v. Kimball, 90 Ill. 356, the court held that where the city raised the grade of a street and constructed sewers for the purpose of carrying off surface water in such an imperfect manner that the water was turned into a basement of a building on the street, the city was liable for such damages as arose from the defective improvement.

the entire northeast portion of the village north of Oak Street declines east to the depression and ditch lying south of the culvert. From the culvert north the decline of the land is toward the north. While the village did not install the tile from the Kuy farm, it did connect the tile into the Kenilworth Avenue sewer, diverting the flow of it from its natural course into the depression. All this water from Kenilworth Avenue north of Oak Street, and from the east portions of the cross streets mentioned and the Kuy farm tile is sent north down Kenilworth Avenue out of its natural course, which is to the east. Inasmuch as the evidence shows the Dwyer land was never flooded prior to the installing of the pavement and the sewers, it is apparent that they are the cause of the flooding. The volume of the water is so great that neither the sewer on Kenilworth Avenue nor the twenty inch sewer of Geneva Road will carry it, and a large part of it enters across the road and the intervening tract onto the Dwyer land with such force as to cause the damages complained of. In such a case the owner of the servant estate is entitled to recover. (Hicks v. Williams, 33 Ill. 355.) Appellant is mistaken in the assumption that the Dwyer claim is based only on speculation. It embraces damages from water diverted from its natural course. Whenever a municipality diverts the flow of water from its natural course, it is liable for damages to the servant estate. (City of Bloomington v. Beckaw, 77 Ill. 124; Nevins v. City of Joliet, 41 Ill. 502; City of Aurora v. Gillett, 59 Ill. 123; City of Aurora v. Reed, 37 Ill. 38.) In City of Elgin v. Kimball, 30 Ill. 136, the court held that where the city raised the grade of a street and constructed sewers for the purpose of carrying off surface water in such an imperfect manner that the water was turned into a basement of a building on the street, the city was liable for such damages as arose from the defective improvement.

The evidence shows the tile drains on the Dwyer place cost about \$550.00, and that Dwyer paid half the cost of the tile across the Nelson tract, besides paying a dollar an hour to laborers repairing the drains, as well as working himself, and that it took three or four days at a time when repairs were made. There is evidence that a vegetable crop lost by a tenant from the flooding of the land in 1936 was worth \$1500.00. Dwyer had an interest in the crop, the extent of which was not shown. Prior to the installation of the pavement and sewers he hired the work to be done by other farmers. It is a matter of common knowledge that farm land rented on a crop sharing plan is customarily rented for not less than one-third of the crop, and if rented for cash it is usually intended to realize as much for the landlord as on the crop sharing plan. Thus the court had a foundation for an estimate of the value of the crop losses to the Dwyers since the pavement and sewers were installed. That the sewage coming onto the premises was an element of damages is apparent, but there was no testimony as to the amount thereof and the trial court did not include it in his calculations. The erosion and the flooding of the land is of course a damage to it. While there is no specific testimony as to the amount of the damage on this account, the proof as to the value of the tile, the labor and the crop losses is sufficient to sustain the judgment for \$1350.00, and it is accordingly affirmed.

Judgment affirmed.



The evidence shows the tile drains on the Twyer place cost

about \$250.00, and that Twyer paid half the cost of the tile drains

the Twyer tract, besides paying a laborer for

ing the drains, as well as working himself, and that it took three or

four days at a time when repairs were made. There is evidence that

a vegetable crop lost by Twyer from the flooding of the land in

1928 was worth \$1500.00. Twyer had an interest in the crop, the extent

of which was not known. Prior to the installation of the drains and

sewers he hired the work to be done by other farmers. It is a matter

of common knowledge that farm lands rented on a crop sharing plan in

ordinarily rented for not less than one-third of the crop, and if rented

for cash it is usually intended to realize an equal for the landlord as

on the crop sharing plan. Thus the court had a foundation for an esti-

mation of the value of the crop losses to the Twyers since the present

and sewers were installed. That the sewage coming into the Twyer

was an element of damage is apparent, but that was not sufficient to

the court should not include it in its calculation.

plans. The problem and the flooding of the land is of course a damage

to it. While there is no specific testimony as to the amount of the

damage on this account, the proof as to the value of the tile, the labor

and the crop losses is sufficient to sustain the judgment for \$1575.00.

and it is accordingly affirmed.

Decree affirmed.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, 1942

FLORENCE HOPPER,  
Appellee

vs.

EDWARD HOPPER,  
Appellant

APPEAL FROM  
CIRCUIT COURT OF  
KANKAKEE COUNTY.

314 I.A. 572<sup>2</sup>

DOVE, J.:

Appellant seeks reversal of a decree of the circuit court of Kankakee County in a separate maintenance proceeding, whereby the court awarded appellee, his wife, \$660.00 per annum, payable in monthly installments of \$55.00 each, and the household goods and furniture subject to an indebtedness of \$120.00, which he was ordered to pay. Appellant was also ordered to pay appellee \$100.00 as and for her solicitor's fee, and all the debts of a tavern and restaurant known as the "Valencia".

The parties were married on November 23, 1920, and lived together as husband and wife until July 9, 1940. They have a son, nineteen years of age, residing with appellee, and a married daughter, seventeen years of age, who lives with her husband. Appellant is an employee of the Public Service Company of Northern Illinois, at Kankakee, and receives a salary of \$170.00 per month. At the time of the separation they lived in a rented house. Appellee, who is in possession of the furniture and furnishings, remained there and claims

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the furniture and furnishings, as well as half of an automobile, the title to which was in appellant's name, and which was in his possession and afterwards disposed of by him.

The complaint alleges that appellant, without any just cause whatsoever, abandoned appellee on July 9, 1940; that she has no means of support or income other than what she may receive from appellant; that as a result of child bearing she has been for many years subject to various ills and is still in need of medical attention and several operations; that during their married life she faithfully discharged her duties as a wife and treated appellant with kindness and forbearance; that the son is unemployed and unable to find work; that for approximately one year prior to the alleged abandonment, the parties conducted the Valencia; that the license was in her name because appellant claimed that if it was in his name it would jeopardize his position with his employer, but that in fact the business was as much the property of appellant as of appellee; that when appellant abandoned appellee he also abandoned the business, and appellee was obliged to sacrifice it <sup>leaving it</sup> with an indebtedness of approximately \$1000.00 which ~~she~~ <sup>appellant</sup> should be compelled to pay.

The answer traverses these allegations seriatim, except the allegation that appellee has no means of support or income, which thus stands admitted. It alleges the Valencia was entirely the enterprise of appellee, and denies liability for any of its debts, or that appellee is entitled to the furniture, a half interest in the automobile, or to separate maintenance or any other relief.

The first ground urged for reversal is that appellee was guilty of such misconduct as contributed materially to the disruption, and that therefore, she is not within the terms of the statute (Ill. Rev. Stat. 1941, chap. 68, par. 23) which provides for separate maintenance of spouses "who without their fault, now live, or hereafter may live separate and apart from their wives or husbands."

the furniture and furnishings, as well as all of the contents of the house, which was in appellant's name, and which was in his possession and control at the time of his death.

The complaint alleges that appellant, without any just cause whatsoever, abandoned appellee on July 2, 1960; that she has no means of support or income other than what she may receive from appellant; that as a result of this conduct she has been for many years subject to various ill and is still in need of medical attention and several prescriptions; that during their married life she faithfully discharged her duties as a wife and trusted appellant with her kindred and possessions; that she can be unemployed and unable to find work; that for a relatively one year prior to the alleged abandonment, the parties conducted the Valencia; that the income was in her name because appellant claimed that it was in his name it would jeopardize his position with his employer, but that as a result of this was as much the property of appellant as of appellee; that when the appellant abandoned appellee he also abandoned the business, and appellee was obliged to maintain it with an income of approximately \$100.00 per month which should be considered as a gift.

The answer to the complaint alleges that the parties were married on July 2, 1960, and that the parties have no means of support or income, which thus places them in a position of financial distress. It alleges that V. L. L. was entirely the property of appellee, and that appellee was entirely the property of appellant, and that appellee was entitled to the business, and it is in the interest of the community, as to separate maintenance of any other relief.

The first ground urged for reversal is that appellee was entitled to such maintenance as contemplated especially in the divorce, and that the divorce was not within the terms of the statute (Ill. Rev. Stat. 1961, chap. 88, sec. 22) which provides for separate maintenance of spouses "who without fault, now live, or hereafter may live apart and apart from their wives or husbands."

It is not within the terms of the statute (Ill. Rev. Stat. 1961, chap. 88, sec. 22) which provides for separate maintenance of spouses "who without fault, now live, or hereafter may live apart and apart from their wives or husbands."

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When appellant left appellee, he left a note reading:

"Flo: Blame yourself for this, this has been working on me for years and now I just can't bear to come home so I am going out of town for a few days. So don't bother to look for me, just leave me alone and we will both be better off. I will keep the car and you have everything else. Ed."

The testimony shows appellee worked in the Valencia kitchen and as a waitress. She testified that on the day appellant left, the children took her home about midnight, and her son-in-law found the note on the bed; that appellant's clothes were gone, and when she called him by telephone asking him to help straighten out the tavern business he refused to do so; and she was forced out of business when some other people bought the place; that when she and appellant took on the Valencia it was taken in her name because appellant did not want it to interfere with his job; that appellant hired the bar-tender, and they both paid his wages and the other current bills; that appellant worked there one morning each week, and both of them took money out of the business.

Benny Casino, the bar-tender, testified that appellee drank on occasions and he had seen her drink to the point of becoming intoxicated; that on one occasion he saw her sitting at the bar with some truck drivers and that she was in a "bad way"; that she was intoxicated, and would start drinking whenever these particular truck drivers came; that another time he saw her when she had been drinking and could not walk straight; that she danced in the middle of the floor on Saturday nights, and when anybody was there she would do a dance with them; that she would take a shawl and go around shaking herself and her feet in the air; that she raised her dress and kicked up her feet; that she kicked straight out in front of her; that he had heard her curse appellant, using profane words and rather bad language; that on some occasions she accused him of associating with lewd women, and that appellant would just walk away; that on Saturday nights a number of





friends of the parties came there; that they had a floor show with an orchestra and singing and dancing; that appellee had a good voice and sang and danced sometimes; that she would drink with customers and sometimes asked the witness not to give her a full drink. He concluded his cross-examination with the statement that he did not want to give the court the impression that she was in the habit of drinking to excess.

Appellee denied ever cursing appellant in the place of business or ever dancing and throwing her legs in the air; she testified she did drink with men customers when she was tending bar if they bought her drinks; but she did not believe she ever drank to the extent of becoming intoxicated; she denied she allowed men to become unduly familiar with her, but allowed them to put their hands on her shoulder, but nowhere else.

While appellant denied the Valencia was his, he testified he procured a loan from one of his friends to buy it, although a friend of appellee offered to lend her the money; that the trouble with his wife started a few days after they were married; that sometimes she drank moderately and sometimes too much; that he left her because of these things, and because he was cursed and wrongfully accused during their entire married life. He said the most serious arguments they had started when appellee wanted to give up the Valencia and he insisted on keeping it. He admitted that when his wife and her sister accused him at the plant about 10:30 or 11:00 o'clock one night of being out with another woman, the woman was back in the plant, and that he had been out in the car with her. Appellee's sister testified they caught appellant with a woman whom she saw in his car; that about five years ago she heard appellee and appellant have an argument, when he wanted to be ~~more~~ more protective to the other woman; <sup>that appellant then</sup> ~~he~~ said he intended to turn over a new leaf. He did not deny this.

friends of the parties came there; that there was a large group with  
an orchestra and singing and dancing; that the other had a good voice  
and was well known; that the crowd of friends with orchestra and  
sometimes asked the witness if he was her father. He denied  
his association with the statement that he did not want to give  
the court the impression that she was in the habit of drinking to excess.  
Appellant denied ever having anything in the place of business or  
ever dancing and drinking her time in the city; she testified she did  
drink with her own mother when she was residing in the city; she  
drinks; but she did not believe she was drunk to the extent of becoming  
intoxicated; she stated she allowed her to possess herself freely with  
her, but allowed them to put their hands on her shoulders, but nowhere  
else.  
While appellant denied the witness was his, he testified he was  
around a large group of his friends to see it, although a witness of  
appellant stated to find her the money; that the trouble with his wife  
started a few days after they were married; that sometimes the drink  
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things, and because he was afraid and indignantly toward during their  
entire married life. He said the most serious argument they had  
started when appellant wanted to leave the witness and he refused  
on hearing it. He admitted that when his wife and he were married  
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to be ~~anyway~~ <sup>the appellant</sup> ~~protective to the other woman~~ <sup>the appellant</sup> ~~in~~ <sup>the</sup>  
turn over a new leaf. He did not deny this.



Appellant testified that sometimes the family arguments might have been his fault and sometimes hers, and that perhaps they were a fifty-fifty proposition; and that he might have cursed her when she cursed him; that if it were not for the children he would have left her long ago, and had told her that when they were grown he was going to leave; and that about a week after he left he abandoned the business and paid some of the bills.

The cashier and waitress at the Valencia testified appellee worked there as a cook and waitress, and <sup>as</sup> a bar-tender <sup>she</sup> took care of the bar; that appellant also worked at the bar and took the money away at night and brought it back in the morning; that she never saw anything wrong with appellee's conduct and never saw her dance on the floor and throw her legs in the air, or curse appellant.

Della Sharp testified that in November, 1940, appellant came to see her about renting a house, telling her he expected to get a divorce right away and marry another woman she named. That he did not rent the house, but the lady and her brother did, and she saw appellant there afterward on several occasions.

Elizabeth Mann testified she had known appellee seven years and that she had a reputation for being a woman of good character and behavior; that she and appellee had taken a few drinks together.

The testimony conclusively shows that the Valencia was as much the property of appellant as it was of appellee. He was willing that his wife should work there. His conduct justified her accusations of infidelity. Conceding that she drank and danced in the Valencia, there is no testimony that tends to show her conduct was lascivious or below the standard of such places or that appellant ever objected to it. While the so-called "Bohemian" free and easy atmosphere of such places is not in keeping with good morals and ideals, appellant, being engaged in the business, is in no position to now complain of his wife's conduct.

Appellant testified that sometime in 1940, appellant and

have been his habit and custom, and that appellant was

is fifty-fifty proposition; and that is all he has heard from

and agreed that it is very far for the children he would have

left her alone, and had said that when they were alone he was

going to leave; and that about a week after he left he changed the

business and paid some of the bill.

The court and witness at the appellant testified appellant was

that is a good and witness, and appellant was at the bar;

that appellant also worked at the bar and took the money out at night

and brought it back in the morning; and appellant was getting along

with appellant's conduct and never saw her dance in the floor and throw

her legs in the air, or dance anything.

On the other hand, appellant said in 1940, appellant came to

see for some reason a house, but he was not to get a divorce

right away and being another reason she asked, that he did not want the

house, but the lady and a brother did, and she was unwilling to

sit down on general conditions.

Appellant then testified that she had heard appellant seven years ago

that she had a reputation for being a woman of good character and was

having; that she had married and had a few children together.

The testimony conclusively shows that the appellant was as much the

property of appellant as is was of appellant. He was willing that his

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fidelity. Conceding that the drunk and bawdy in the "house", there

is no testimony that tends to show that appellant was in a position as before

the standard of work places in that appellant was not to it.

While the so-called "house" was and was not a place of such place

is not in keeping with good morals and the law, appellant, being married

to the business, is in no position to now complain of his wife's conduct.

There is no testimony that tends to show it materially contributed to the disruption. The testimony as to her reputation as a woman of good character stands uncontradicted. On the other hand there is evidence that tends to show he left her on account of another woman. If she publicly upbraided him for his philandering, it is not surprising that her environment, in which he acquiesced, might induce strong language compatible with their mode of living. Under the evidence appellee has made out a case within the purview of the statute.

However, we find no evidence in the record that justifies those parts of the decree awarding the title to the furniture and furnishings to appellee, and requiring appellant to pay the indebtedness against it and the obligations of the Valencia. The law is that if either or both of the parties have equitable rights in property, other than through the marriage relation, by reason of having purchased or contributed to the purchase or accumulation thereof, the court may decree equities to both in such property or award it to the one who purchased it outright or award other property in lieu thereof. If the wife has no claim for separate maintenance or alimony except the existence of the marriage relation and the husband's fault, an allowance should be paid in money at stated intervals. (Decker v. Decker, 279 Ill. 300.) There is no showing in this case that appellee has any claim for separate maintenance except the marriage relation and the husband's fault. While it may be that under section 44 of the Civil Practice Act and rules 10 and 11 of the Supreme Court, separate causes of action may be joined (Glennon v. Glennon, 299 Ill. App. 13) yet in order to recover in such a case it is necessary to make proofs that will justify the decree entered. Although the complaint in this case asks that appellee be awarded the furniture and furnishings, and that appellant be required to pay the indebtedness against it and the debts of the Valencia, there





is no testimony that shows appellee bought or contributed to the purchase of the furniture or furnishings with her own means or that she had any rights therein except through the marriage relation. Her testimony shows that appellant was not the sole owner of the Valencia, and it is not claimed the debts of that business were incurred by him any more than by her. The ownership and operation of that business and its obligations are matters wholly unrelated to the statutory objects and purposes of a proceeding for separate maintenance. No reason is shown why appellant should be required to pay its entire indebtedness. The fact that he is liable for appellee's separate maintenance is not a reason why he should be required to assume her part of the obligations of an unrelated business venture. There is no testimony which shows any reason why he should be divested of his title to the furniture and furnishings or required to pay the debt against it. Without evidence to sustain a decree it cannot stand. The award as to the furniture and furnishings should have been confined to the use thereof.

No testimony was heard as to the value of the services of appellee's solicitor. In such a case it is error to make an allowance for solicitor's fees. (Metheny v. Bohn, 164 Ill. 495; Cash v. Cash, 180 Ill. App. 51.)

That part of the decree awarding appellee separate maintenance is affirmed. Those portions of it awarding appellee title to the furniture and furnishings, and ordering appellant to pay the indebtedness thereof and the debts of the Valencia, and appellee's solicitor's fee are reversed, and the cause is remanded with directions to take such

further steps as are in harmony with the views herein expressed. *Each party to pay one-half the costs in this court.*

Reversed in part and remanded with directions.





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, A. D. 1942

HIRAM E. TODD,

Appellee

vs.

CHARLES P. GREEN,

Appellant

APPEAL FROM

CIRCUIT COURT OF

MARSHALL COUNTY.

314 I.A. 573

DOVE, J.:

This is an appeal from a summary judgment of the circuit court of Marshall County against appellant in a forcible detainer proceeding, awarding appellee possession of certain hotel premises and its furnishings in the City of Henry. Procedural rulings are also complained of. On the oral argument in this court appellee abandoned a cross appeal on the failure of the trial court to allow him double rent for alleged willful holding over.

It appears from the complaint and exhibits that appellant was a tenant of the hotel and the furnishings, under a five year lease between appellee and C. J. Turpen, expiring August 9, 1940; that appellant was assignee of Turpen and held over, paying rent, thereby creating a tenancy from year to year; that on May 21, 1941, appellee mailed appellant a written notice terminating the tenancy at the end of the tenancy year, and that appellant acknowledged in writing the receipt of a copy of the notice. The complaint alleges that, relying upon surrender of possession



by appellant pursuant to such notice, appellee made commitment for possession, and that he suffered damages on account of the wrongful withholding.

The motion for summary judgment was supported by an affidavit of appellee's counsel alleging personal knowledge of and that he could testify to the facts alleged in the complaint; that affiant had personally engaged in almost all the negotiations leading up to the execution of the lease and the assignment thereof, and had acted as agent for appellee at all times in dealings with appellant; that appellant never claimed to affiant any interest in or right to possession of the premises or the chattel property except as tenant under the assignment of the lease or as tenant from year to year after its expiration date; that on May 22, 1941, affiant caused to be served upon appellant a notice of the termination of tenancy and that appellant endorsed his receipt for the same upon the original copy of the notice; that thereafter appellant gave no notice of claim of interest in the premises except to tender a check for \$100.00, stated by appellant to be for payment of rent to September 15, 1941, which check was returned by affiant; that appellant in several communications to affiant and in all things prior to the termination of the tenancy on August 8 or 16, 1941, led affiant to believe possession of the premises and the chattel property would be surrendered peaceably upon the expiration of the term in accordance with the notice of termination; that in reliance upon surrender by appellant pursuant to such notice, appellee made a commitment for possession to commence upon the expiration of the time pursuant to the notice, and that appellant had full notice and knowledge of the commitment.

Appellant filed a motion to dismiss the complaint on the grounds that it stated conclusions, not facts; that it failed to state a cause of action; and that appellee was without authority to prosecute the suit.



ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

It is noted that the above information is not to be used for any purpose other than that for which it was provided.

An additional affidavit by appellee's counsel in support of the motion for summary judgment alleges that the copy of the instrument thereto attached is a true copy of an agreement entered into on January 31, 1941, between appellee and C. L. Hughes, agent; that the contract being silent as to the right of possession as between the parties thereto, it was verbally agreed between the affiant and C.L. Hughes, agent as aforesaid, that appellee should retain his reversionary right to possession until actual possession was obtained by him, and that then appellee should deliver possession to Hughes, agent as aforesaid. The terms of the contract, as shown by the copy, are that if Hughes shall first make the payments and perform the covenants hereinafter contained, appellee agrees to convey the premises and the chattels therein owned by him to Hughes for the price of \$20,000.00 of which \$1000.00 was paid down. \$500.00 additional was to be paid when actual possession was delivered; the remainder to be paid in installments of \$75.00 or more per month, beginning on the first day of the month following the date actual possession was given. The contract provides that Hughes was to be credited with one-twelfth of the 1941 taxes for each month until actual possession was delivered, and that appellee was to give notice cancelling the lease and take such steps as were necessary to remove appellant as tenant.

Appellant filed a counter-affidavit to the motion for summary judgment, in which he denies being personally served with notice of the termination of the lease, and alleges the service was by mail. The affidavit does not deny receipting for a copy of the notice endorsed upon the original. It denies he gave no notice of claim of interest; alleges large expenditures in cleaning and improving the premises at appellee's request and by his consent; that appellee does not own the





property, but holds title as trustee for the benefit of the original bondholders under a foreclosure, and has no legal right to prosecute the suit without their written direction, and that they are necessary parties. That under the contract of appellee with Hughes as agent, the persons for whom Hughes purported to act are the equitable owners and the only persons entitled to possession; that Hughes is insolvent and has no property out of which an execution could be satisfied, and is a "mere alleged promoter"; that Hughes attempted to form a corporation in connection with the purchase of the property, and affiant is informed and believes all the stock, except two shares, was issued to Hughes; and that Hughes is the principal and in fact the only person entitled to possession; that ever since the date of the contract between Hughes and appellee, Hughes had been negotiating for the purchase of appellant's equipment in the premises, and that they had agreed that appellant should have possession of the premises until January 1, 1941, and that on or before that date Hughes would purchase appellant's equipment except that of the kitchen and tap room which appellant was to retain; that Hughes has proven to be irresponsible and not a man of his word, and has misled appellant in all of such transactions; that all of the same were known at the time to appellee and his agent. The affidavit concludes by demanding a jury trial. A separate demand for jury trial was also filed.

Appellant's motion for leave to amend instanter his motion to dismiss, his motion for leave to present oral testimony in support of the motion to dismiss, and the motion to dismiss, were denied. Leave to answer was granted. His motion for leave to file within ten days cross-affidavits to the motion for summary judgment was denied. Answer was filed, alleging service of notice of termination of tenancy was insufficient, not meeting the requirements of the statute; denying wrongfully withholding possession; and alleging Hughes is the only person entitled to possession; and denies



appellee relied upon surrender of possession and that he has suffered damages. No evidence was heard, and the court entered summary judgment in favor of appellee for possession.

Appellant's brief states that in accordance with his contract with Hughes he surrendered possession of the premises on December 31, 1941, and that Hughes is in possession. The issue as to double rent being out of the case, it is apparent that the only remaining interest of either party would be the question of costs. The rule is well settled that the existence of an actual controversy is an essential requisite to appellate jurisdiction, and a reviewing court will dismiss an appeal where facts are disclosed which show that such a controversy does not exist, even though such facts do not appear of record. When there is no real present question involving actual interests and rights for a reviewing court to consider, the court should not be compelled to review a cause merely for the purpose of determining who ought to pay the costs of the suit or to establish a precedent. (Chaitlen v. Caspar American State Bank, 372 Ill. 83; Wick v. Chicago Telephone Co., 277 id. 338; People v. Sweitzer, 329 id. 380.) Under these authorities, the appeal is dismissed.

Appeal dismissed.



apportioned relief upon a review of the facts and the law, and the court should exercise judgment.

In favor of the plaintiff.

Appellant's brief states that in connection with its contract with

Plaintiff he introduced possession of the premises on December 21, 1911.

and that notice is in default of the law as to the time when notice

out of the case, it is apparent that the only reasonable inference is

either party would be the question of costs. The rule is well settled

that the existence of an actual controversy is an essential requisite

to appellate jurisdiction, and a reviewing court will dismiss an appeal

where facts are disclosed which show that such a controversy does not

exist, even though there is no report of record. Such cases are

no real present question involving actual interests and rights for

reviewing courts to consider, the court should not be compelled to review

a case merely for the purpose of determining who shall pay the costs

of the suit or to establish a precedent. (Matter v. People's Loan

Estate Bank, 772 Ill. 57; 112 v. Chicago Telephone Co., 177 Ill. 120;

People v. O'Neil, 122 Ill. 120.) Under these authorities, the appeal is

dismissed.

Appeal dismissed.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY Term, A. D. 1942

THE PEOPLE OF THE STATE  
OF ILLINOIS, ex rel  
WITLY Z. MITCHELL,

APPELLANT

vs.

OTTO W. ARNSPACH, as President  
of the Village of Villa Park, et al.,

APPELLEES

APPEAL FROM

CIRCUIT COURT

OF DuPAGE COUNTY.

314 I.A. 573<sup>2</sup>

DOVE, J.:

Relator filed a petition in the circuit court of DuPage County for a writ of mandamus commanding the fire<sup>and</sup> police commissioners of the Village of Villa Park to reinstate relator to the position or office of chief of police, or as a member of the police department, commanding the president, trustees and clerk to issue to him warrants for his salary as chief of police, or as a member of the police department, from May 13, 1941 and commanding the village treasurer to honor and pay such warrants on presentation. The respondents filed a motion to dismiss which, upon a hearing, was sustained, and the suit was dismissed at the costs of the relator. To reverse that judgment this appeal has been prosecuted.

The petition, after formal allegations as to the parties, sets out village ordinance No. 247 of the year 1928, establishing a department of police, providing by section 8 for a police committee to

IN THE

ILLINOIS

COUNTY OF DU PAGE

STATE OF ILLINOIS, A.D. 1912

THE PEOPLE OF THE STATE  
OF ILLINOIS, ex rel  
WILLY & MICHAEL

PLAINT FROM

IN COURT

OF DU PAGE COUNTY,

OTIS W. ALBACH, as President  
of the Village of Villa Park, et al.,

Defendants

314 I.A. 573

DOVE, J.

Relator filed a petition in the circuit court of DuPage County for a writ of mandamus commanding the five police commissioners of the Village of Villa Park to reinstate relator to the position or office of chief of police, or as a member of the police department, commanding the president, trustee and clerk to issue to him warrants for his salary as chief of police, or as a member of the police department, from May 13, 1911 and commanding the village treasurer to honor and pay such warrants on presentation. The respondents filed a motion to dismiss which, upon a hearing, was sustained, and the suit was dismissed at the costs of the relator. To reverse that judgment this appeal has been prosecuted.

The petition, after formal allegations as to the parties, sets out village ordinance No. 247 of the year 1908, establishing a department of police, providing by section 3 for a police committee to



supervise and control, with the president, the police department, and creating the offices of a chief of police, a captain of police, a desk sergeant "and as many patrolmen as necessary." The petition also alleges that ordinance No. 382 of April 30, 1937 amended section 8 of ordinance No. 247, by providing for suspension of members of the police department by the chief of police or the village president; and sets forth ordinance No. 408 of February 24, 1938, which created the office of commissioner of police, with control of the police department, subject to supervision of the president of the board of trustees.

The petition then alleges the adoption of the Fire and Police Commissioners act (Ill. Rev. Stat. 1939, chap. 24, par. 843, et seq.) at the annual village election of village officials on April 15, 1941, and the subsequent appointment by the village president of three of the respondents, who qualified and still act as members of the board of fire and police commissioners. The pertinent provisions of section 11, specially relied upon for reversal, as in force during the period in controversy, are:

"No officer or member of the fire or police department of any such city, village or incorporated town, who shall have been such for more than one year prior to the adoption of this Act, by such city, village or incorporated town, \*\*\*, shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be investigated by such Board of Fire and Police Commissioners, and in case such officer or member be found guilty, such board may remove or discharge him, or may suspend him not exceeding ten days without pay.\*\*\*.

The term officer or member of the fire or police department of such city, village or incorporated town as used herein shall include all officers and members of the fire and police departments of such cities, villages or incorporated towns who shall have been employed as regular members of such fire or police department for more than one year. Such regular employment for more than one year shall constitute such officers or members city officers."

It is then alleged:

"That relator has been a regular member of the Police Department of the Village of Villa Park since August 15th, 1939, having been appointed on that date acting Chief of Police by George A. Olson, F.W. Hartman and R. K. Butts, the Police Committee of the Board of Trustees of Villa Park; that Relator's appointment to said office or position was made in writing and is in words and figures as follows, to-wit:

supervise and control, with the president, the police department, and creating the office of a chief of police, a captain of police, a desk sergeant "and as many patrolmen as necessary." The petition also alleges that ordinance No. 388 of April 30, 1937 amended section 8 of ordinance No. 247, by providing for suspension of members of the police department by the chief of police or the village president; and sets forth ordinance No. 408 of February 24, 1938, which created the office of commissioner of police, with control of the police department, subject to supervision of the president of the board of trustees.

The petition then alleges the adoption of the Fire and Police Commissioners act (Ill. Rev. Stat. 1939, chap. 24, par. 243, et seq.) at the annual village election of village officials on April 15, 1941, and the subsequent appointment by the village president of three of the respondents, who qualified and still act as members of the board of fire and police commissioners. The pertinent provisions of section 11, specially relied upon for reversal, as in force during the period in controversy, are:

"No officer or member of the fire or police department of any such city, village or incorporated town, who shall have been such for more than one year prior to the adoption of this act, by such city, village or incorporated town, \*\*\* shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be investigated by each Board of Fire and Police Commissioners, and in case such officer or member be found guilty, such board may remove or discharge him, or may suspend him not exceeding ten days without pay.\*\*\*"

The term officer or member of the fire or police department of such city, village or incorporated town as used herein shall include all officers and members of the fire and police departments of such cities, villages or incorporated towns who shall have been employed as regular members of such fire or police department for more than one year. Such regular employment for more than one year shall constitute such officers or members city officers."

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'The Committee has appointed Officer Mitchell as Acting Chief of Police and recommends that his compensation be increased to \$165.00 per month while he is serving in this capacity. The Committee trusts that this action meets with your approval. Respectfully submitted, George A. Olson, Chairman, F. W. Hartman, Member, R. K. Butts, Member.'

It is further alleged that on the same day, at a regular meeting of the board of trustees, relator's salary as acting chief of police was fixed at \$165.00 per month, quoting minutes of the meeting as follows:

"President Murphy entertained a motion that Mr. Mitchell, after action by the Police Committee, receive \$165.00 per month while serving as Acting Chief of Police, motion carried unanimously on a roll call vote."

Then follows an allegation "that on February 19, 1940, after relator had served his probationary period of six months, the Police Committee constituted as aforesaid recommended to the President and Board of Trustees the appointment of relator as Chief of Police of the Village", and sent a letter to this effect to the president, which, omitting the address and signatures, reads:

"At a meeting of the Police Committee held February 18, 1940, at 11:30 A.M., it was unanimously agreed that Acting Chief of Police Witley Z. Mitchell be appointed Chief of Police. The Committee respectfully requests his appointment at the board meeting of February 19, 1940."

It is then alleged:

"That on February 19, 1940, the President with the approval of the Board of Trustees, accepted the Committee's recommendation and appointed relator Chief of the Police Department for the term expiring April 30th, 1941; that petitioner offers to produce at the hearing of this cause a certified copy of the proceedings of this meeting; that thereafter at a regular meeting of the Board of Trustees of the Village of Villa Park held on May 20, 1940, Lawrence S. Murphy, President, announced that all village appointments for the coming year, except the Building and Plumbing Inspector would remain the same; that the minutes of this meeting so far as they are pertinent to this suit, read as follows:

'At this time President Murphy stated that the appointments as before remain the same, except the Building and Plumbing Inspector. Trustee Butts moved that the appointments be approved, seconded by Trustee Olson and unanimously carried.'

Further allegations are: "That by the general ordinance of the Village governing the Police Department and this appointment, relator, who was holding the office of Chief of Police, was reappointed to that



The Committee has appointed Officer Michael J. ...  
of Police ...  
16.00 per cent ...  
...  
fully exempted ...  
Butt, ...

:8vo[[03

"President Truman sent me a letter last night, asking me to go to Washington tomorrow morning at ten o'clock." - Vice President Nixon said.

J. Edgar Hoover

Then follow an allegation that on March 1, 1934, after relief had been granted to a riot of six months, the police Committee constituted, as the said record of the President and Board of Trustees the appointment of relief for relief of the "Vill Ge", and that I refer to this effort of the President, which, with the above and eight others, read:

[illegible]

It is then proved:

1941: The petitioner offers to produce to the Board of Trustees of the Village of Villa Park a certified copy of the proceedings of the regular session of the Board of Trustees of Villa Park held on May 8, 1940. Lawrence G. Lutz, President, announced that all village appointments for the coming year, except the English and Rump- ing Inspectors would remain the same; that the minutes of this meeting as far as they are pertinent to this point, read as follows:

Trustee Olson and unanimously carried."

Further allegations are: "That by the general ordinance of the Village governing the Police Department and its subordinate, officers who were holding the office of Chief of Police, was reappointed to that

office, for the period of one year, commencing May 20, 1940, and ending May 19, 1941; that relator has occupied the office of Chief of Police constantly from August 15, 1939, up to and including May 12th, 1941;" that on May 13, 1941, he was told by the president and members of the police committee that he had been discharged from the office of Chief as of May 12, 1941, whereupon he wrote a letter to the commissioner of police, the president and one of the trustees advising them he stood ready to perform the duties and office of chief of police, acting chief of police, police officer and member of the police department in whatever capacity he was directed to serve, and was a de jure officer employed by the village prior to the adoption of civil service for police officers by vote of the people of the village; and received a reply from the president informing him he had not been a member of the police department for many months last past; that the official records of the board of trustees show that on May 12, 1941, a resolution was adopted declaring that the office of chief of police is and had been for many months last past vacant; that on the day last named, ordinance No. 456, abolishing the office of chief of police, and ordinance No. 457, creating the office of village marshal, were adopted as a part of a pre-conceived plan to discharge relator without a hearing by the board of fire and police commissioners, and to evade the provisions of the Fire and Police Commissioners act and exclude him from its benefit and protection; that upon the adoption of the act the right to appoint and discharge members of the police department, including the office or position of chief of police or village marshal became vested exclusively in the board of fire and police commissioners; that relator, having been a member of the police department for more than one year prior to April 12, 1941, holding the office of Chief, was entitled as a matter of right to continue in that office or position, or at least as a member of the department, and enjoy the salary attached thereto until discharged

office, for the period of one year, commencing July 1, 1900, and ending May 13, 1901; that relator was assigned to the office of Chief of Police constantly from August 15, 1899, up to and including May 13, 1901; that on May 13, 1901, he was assigned by the President and members of the police committee that he had been discharged from the office of Chief of Police as of May 13, 1901, whereupon he wrote a letter to the Commissioner of Police, the President and one of the trustees existing then in regard ready to perform the duties and office of Chief of Police, setting out of Police, Police Officer and member of the Police Department in that ever capacity he was directed to serve, and was a Police Officer employed by the village prior to the abolition of civil service for police officers by vote of the people of the village; and received a reply from the President informing him he had not been a member of the Police Department for many months last past; that the official records of the board of trustees show that on May 13, 1901, a resolution was adopted declaring that the office of Chief of Police is abolished for many months last past; that on the 6th day last named, ordinance No. 456, abolishing the office of Chief of Police, and ordinance No. 457, creating the office of Village Marshal, were adopted as a part of a pre-conceived plan to discharge relator without having by the board of fire and Police Commission, and to evade the provisions of the Fire and Police Commission act and exclude him from its benefits and protection; that upon the adoption of the act the right to appoint and discharge members of the Police Department, including the fire or position of Chief of Police or Village Marshal became vested exclusively in the board of Fire and Police Commissioners; that relator, having been a member of the Police Department for more than one year prior to April 13, 1901, holding the office of Chief, was entitled as a matter of right to continue in that office or position, or at least as a member of the department, and enjoy the salary attached thereto until discharged



or removed by the fire and police commissioners for just cause after a hearing upon written charges preferred against him; and that the action of the president and board of trustees in attempting to retain in its power the right to appoint and discharge the chief of police or village marshal was void, as in contravention of the terms of the act. The petition then alleges the provisions of the annual appropriation ordinance for the fiscal year "ending April 30, 1942" as containing items of: "C. 1 Salary Chief of Police (Under name of Village Marshal, \$2100.00.) -2. Salary Police Officers, \$9000.00", and that he is entitled to reinstatement to the office of chief of police and a salary of \$2100.00 fixed by the appropriation ordinance, or, in the alternative, to the position of patrolman or member of the police department and to the salary of \$1500.00 fixed by such ordinance.

An amendment to the petition alleges that on August 15, 1939, the date relator was appointed acting chief of police, he took the oath of office prescribed by the village ordinance, and at the same time offered to post the \$1000.00 bond required by the ordinances of the village, but was told by the police committee and the board of trustees they were not requiring the members of the police department to post a bond because of the expense it would incur; that he was further told the village was having a difficult time meeting its already existing and outstanding debts and could not pay for bonds of members of the department; that on February 19, 1940, and again on May 20, 1940, he again took the oath of office, and on or about the last mentioned date advised the board of trustees he would secure a surety bond at his own expense if the village would require subordinate members of the police department to execute a similar bond, but was again told by the police committee and the board of trustees they were excusing the members of the department from posting bond and he should make no further effort to secure it.

or removed by the fire and police commissioners for that cause after a hearing upon written charges preferred against him; and that the action of the president and board of trustees in attempting to retain in its power the right to appoint and discharge the chief of police or village marshal was void, as in contravention of the terms of the act. The petition then alleges the provisions of the annual appropriation ordinance for the fiscal year "ending April 30, 1942" containing these items: "C. I. Salary Chief of Police (Under name of Village Marshal, \$3100.00.) - 2. Salary Police Officers, \$9000.00; and that he is entitled to reinstatement to the office of chief of police and a salary of \$3100.00 fixed by the appropriation ordinance, or, in the alternative, to the position of patrolman or member of the police department and to the salary of \$1500.00 fixed by such ordinance. An amendment to the petition alleges that on August 15, 1940, the date referred was appointed acting chief of police, he took the oath of office prescribed by the village ordinance, and at the same time offered to post the \$1000.00 bond required by the ordinance of the village, but was told by the police committee and the board of trustees they were not requiring the members of the police department to post a bond because of the expense it would incur; that he was further told the village was having a difficult time meeting its already existing and outstanding debts and could not pay for bonds of members of the department; that on February 19, 1940, and again on May 30, 1940, he again took the oath of office, and on or about the last mentioned date advised the board of trustees he would secure a surety bond at his own expense if the village would require subordinate members of the police department to execute a similar bond, but was again told by the police committee and the board of trustees they were excusing the members of the department from posting bond and he should make no further effort to secure it.

We will first consider the claim for alternative relief. The petition does not allege relator was ever appointed as a patrolman or to any position or office or as a member of the police department other than as acting chief of police, and as chief of police. In this court he states that he seeks restoration either to the office or position of chief of police, or in the alternative to any position in the police department; and claims that it is only necessary to show the position is one properly under the Fire and Police Commissioners act and that appropriations have been made therefor. He relies upon the following cases; People ex rel. Baird v. Stevenson, 270 Ill. 569; People ex rel. Sellers, v. Brady, 262 id. 578; People ex rel. Jacobs v. Coffin, 282 id. 589; and People ex rel. Kelly v. Dunham, 313 Ill. App. 18. Each of those cases involved the right to be restored to a particular position formerly held by the petitioner, and none of them has any bearing on the question of an alleged alternative right. In claiming that he is entitled in the alternative to be restored to "any" position in the police department, relator loses sight of the fact that one cannot be restored to a position he never held. Under the allegations of the petition it is obvious that if relator is entitled to any relief, it is not to alternative relief as a patrolman or to any other position apart from the office of chief of police. Furthermore, as to any right to be restored as a "member" of the police department, it is to be noticed that section 11 of the Fire and Police Commissioners act prescribes two classes to which it applies, i. e., "officers" and "members". Otherwise there would be no occasion to employ both of those terms. That there is a difference between an office, a position and an employment is pointed out in People ex rel. Jacobs v. Coffin, supra. The intent in section 11 to distinguish between the two classes therein mentioned is clear. The term "Officer" obviously refers to an officer in the commonly accepted meaning of that word. It is equally apparent that the term "member" refers to those who are not designated as officers. There is





nothing in the act from which it can be implied that the distinction can be ignored or relaxed so as to include an officer, either de jure or de facto, in the term "member" as separate or distinguished from his office. The allegation that relator was "a member of the police department" is a conclusion of the pleader, concerning which no fact is alleged. By ordinance No. 247 the position of chief of police was an office, and it is the only position to which it is claimed relator was ever appointed, except his alleged previous appointment as acting chief of police for six months. Therefore the petition must stand or fall upon the allegations as to his appointment as an officer to the office of chief of police and his incumbency thereof.

That issue must be decided upon the sufficiency of the facts well pleaded, which are admitted by the motion to dismiss, and not upon the conclusions of the pleader. (Barzowski v. Highland Park State Bank, 371 Ill. 412.) It is fundamental that mandamus is an extraordinary remedy, and that it is necessary that the petition show a clear right to the writ. Where one claims the right to an office it must affirmatively appear that the office legally exists and that the petitioner is lawfully entitled thereto. It is not enough that he was acting in an official character, but the petition must show that he was an officer de jure and not de facto. (People ex rel. Dunderdale v. City of Chicago, 327 Ill. 62; Moon v. <sup>The</sup> Mayor, 214 id. 40; Stott v. City of Chicago, 205 id. 281; Kenneally v. City of Chicago, 220 id. 485; McNeill v. City of Chicago, 212 id. 481; Purley v. Barber, 286 Ill. App. 486.)

Section 7 of ordinance No. 247 of the village provides:

"All members and officers of the police department shall be appointed by action of the president and board of trustees of the Village of Villa Park, to be shown of record."

The statute governing appointments of village officials during the period in controversy (Ill. Rev. Stat. 1939, chap. 24, par. 152, provided:

"The president and board of trustees may appoint a clerk pro tempore, and whenever necessary to fill vacancies; and may also appoint a treasurer, one or more street commissioners, a village marshal, and such other officers as may be necessary to carry into effect the powers conferred

nothing in the act from which it can be inferred that the distinction can be made or intended to include an officer, either of these or de facto, in the term "leader" or separate or distinguished from his office. The allegation that the officer was "a member of the police department" is a conclusion of the pleader, concerning which no fact is alleged. By ordinance No. 247 the position of chief of police is an office, and it is the only position to which it is claimed the officer was ever appointed, except the alleged previous appointment as acting chief of police for six months. Therefore the position must stand or fall upon the allegations as to his appointment as an officer to the office of chief of police and his incumbency thereof.

That issue must be decided upon the sufficiency of the facts well pleaded, which are admitted by the motion to dismiss, and not upon the conclusion of the pleader. (Rosenfeld v. Highland Park City, 371 Ill. 112.) It is fundamental that mandamus is an extraordinary remedy, and that it is necessary that the petition show a clear right to the writ. Where one claims the right to an office it must affirmatively appear that the office legally exists and that the petitioner is lawfully entitled thereto. It is not enough that he was acting in an official character, but the petition must show that he was an officer de facto and not de jure. (People ex rel. Dunderberg v. City of Chicago, 337 Ill. 62; Moon v. Meyer, 314 Ill. 42; Scott v. City of Chicago, 306 Ill. 281; Kennedy v. City of Chicago, 230 Ill. 485; McCall v. City of Chicago, 213 Ill. 431; Purley v. Barber, 286 Ill. App. 482.)

Section 7 of ordinance No. 247 of the village provides:

"All members and officers of the police department shall be appointed by action of the board of trustees of the Village of Villa Park, to be shown of record."

The statute governing appointments of village officials during the period in controversy (Ill. Rev. Stat. 1907, Chap. 24, par. 122, provided: "The president and board of trustees may appoint a clerk and treasurer, and whenever necessary to fill vacancies; and may also appoint a treasurer, one or more street commissioners, a village marshal, and such other officers as may be necessary to carry into effect the powers conferred



on villages, to prescribe their duties and fees, and require such officers to execute bonds as may be prescribed by ordinance."

It has frequently been held that this section requires joint action by the president and trustees, each casting one vote, and that an appointment made by the president and approved by the trustees does not meet the requirements of the statute. (Six v. Village of Bluffs, 283 Ill. App. 640; People ex rel. Janosky v. Novotny, 273 id. 254; Lightfoot v. Village of Evergreen Park, 307 id. 411; People ex rel. McGinnis v. Paynter, 197 id. 78; McKean v. Gauthier, 132 id. 376; People ex. rel. Clute v. Hitchcock, 148 id. 446.) In McKean v. Gauthier, supra, cited also by appellant, four of six trustees voted that the plaintiff be appointed night watchman. The president did not vote when the roll was called, having previously requested to be excused from voting on appointments. Plaintiff filed his bond which was approved on a similar roll call, and his oath of office. The holding that mere irregularities in the manner of putting the question could not avail the president in a mandamus proceeding to compel him to sign warrants for the plaintiff's salary does not lessen the effect of the holding in the same case that the power of appointment resides in the president and trustees jointly.

The facts alleged by the petition as to relator's appointment are that he was appointed acting chief of police by the police committee of the board of trustees; "that on February 19, 1940, the President with the approval of the Board of Trustees, accepted the committee's recommendation and appointed relator Chief of the Police Department for the term expiring April 30th, 1941;" and that at a meeting held on May 20, 1940, the president "stated that the appointments as before remain the same, except the Building and Plumbing Inspector," with a motion carried that the appointments be approved. There is no allegation that any statute or ordinance authorizes appointments of officials by any committee, and any such ordinance would manifestly be invalid as not in compliance with the statute. Neither is there any allegation that relator was appointed

on villages, to prescribe their duties and fees, and require each officer to execute his duty as prescribed by ordinance."

It has frequently been held that the action is a joint

action by the president and trustees, each having one vote, and

that an ordinance made by the president and approved by the trustees

does not meet the requirements of the statute. (See v. Village of

St. Louis, 203 Ill. App. 640; People ex rel. January v. November, 278

Ill. 324; People ex rel. January v. November, 207 Ill. 11; People

ex rel. November v. January, 127 Ill. 78; McKean v. Gauthier, 132 Ill.

376; People ex rel. Gauthier v. McKean, 148 Ill. 458.) In McKean v.

Gauthier, supra, cited also by appellant, four of the trustees voted

that the plaintiff be appointed night watchman. The president did not

vote when the roll was called, having previously requested to be excused

from voting on appointments. Plaintiff filed his bond which was ap-

proved on a similar roll call, and his oath of office. The holding that

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avail the president in a mandamus proceeding to compel him to sign

warrants for the plaintiff's salary does not lessen the effect of the

holding in the same case that the power of appointment resides in the

president and trustees jointly.

The facts alleged by the petition as to relator's appointment are

that he was appointed acting chief of police by the police committee of

the board of trustees; "that on February 12, 1940, the President with

the approval of the Board of Trustees, accepted the committee's recommend-

ation and appointed relator Chief of the Police Department for the term

expiring April 30th, 1941;" and that at a meeting held on May 20, 1940,

the president stated that the appointments as before remain the same,

except the Building and Plumbing Inspector, "with a motion carried that

the appointment be approved. There is no allegation that any statute

or ordinance authorized appointment of officer as by any committee, and

any such ordinance would manifestly be invalid as not in compliance with

the statute. Neither is there any allegation that relator was appointed

by the president and the trustees, as prescribed by the statute. Under the above holdings the approval by the trustees of the appointment made by the president does not meet the statutory requirements.

There is another reason why relator was not a de jure officer.

Section 4 of article 6 of the Cities and Villages act as then in force (Ill. Rev. Stat. 1939, chap. 24, par. 87,) provided:

"All officers of any city or village, whether elected or appointed, shall, before entering upon the duties of their respective offices, take and subscribe the following oath or affirmation: \* \* \* Which oath or affirmation, so subscribed, shall be filed in the office of the clerk. And all such officers, except aldermen and trustees, shall, before entering upon the duties of their respective offices, execute a bond with security to be approved by the city council or board of trustees, payable to the city or village, in such penal sum as may, by ordinance or resolution, be directed, conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer, according to law and the ordinances of said city or village. \* \* \* Such bonds shall be filed with the clerk. \* \* \*"

Section 2 of ordinance No. 247 sets the bond of the chief of police at \$1000.00. The petition does not allege that relator ever filed his oath with the clerk, and affirmatively shows that he never executed a bond, as required by both the statute and the ordinance. Of course if he never executed a bond he did not file it with the clerk. The statute requires that both the oath and the bond shall be so filed. Nobody has any authority, either as individuals, or as president and board of trustees acting as such, whether at a regular meeting or otherwise, to waive the provisions of the statute, and it is not even alleged that the village officials attempted to waive such provisions at any meeting of the board. Relator's alleged offer to furnish bond if subordinate members were required to do so was merely conditional and did not amount to an offer to comply with the law. The claim that the village should be estopped from contending relator had not been employed as a regular member of the police department is without merit. Treating him as such did not create an estoppel. (Bullis v. City of Chicago, 235 Ill. 472;





People ex rel. R~~ally~~ v. City of Kankakee, 333 Ill. App. 192.) The case of Frederick v. City of Peoria, 203 Ill. App. 486, relied upon by appellant, was not a mandamus proceeding, but was a suit for salary as a holdover officer, after having been properly appointed and having qualified by filing his oath and bond. One who has once been regularly appointed and has qualified by filing his oath and bond, does not, by failing to file a new oath and bond upon his reappointment, cease to be a de jure officer. (City of Pekin v. Industrial Commission, 341 Ill. 312.) The Frederick case has no application here.

The most that the petition shows is that relator was a de facto officer until he was discharged. Being only such, he was holding and exercising the functions of his office at the mere will of the village and could be deprived of it at any moment the village might elect. Having never been appointed in the manner prescribed by law, and having never qualified, he was not a de jure officer, and is not entitled to the writ. (McNeill v. City of Chicago, supra.)

We do not agree with the relator's contention that ordinances Nos. 456 and 457 are void. He alleges they were adopted for the purpose of discharging him without a hearing by the board of fire and police commissioners, and to evade the provisions of the Fire and Police Commissioners act and deprive him of its benefit and protection. In People ex rel. Jacobs v. Coffin, supra, a civil service employee, regularly appointed in compliance with the provisions of the Civil Service Act, was suspended for thirty days, restored to the rolls, and again laid off. The records of the civil service commission showed that on the same day the position was abolished. Nevertheless, another party was appointed to perform the duties of the position. Under the act the petitioner could not be suspended for more than thirty days or discharged except for cause on written charges and a hearing. In holding

People ex rel. Bailey v. City of Keokuk, 202 Ill. App. 128. The case of Jackson v. City of Peoria, 203 Ill. App. 488, relied upon by appellant, was not a mandamus proceeding, but was a suit for salary as a holdover officer, after having been properly appointed and having qualified by taking his oath and bond. One who has once been regularly appointed and has qualified by taking his oath and bond, does not, by failing to file a new oath and bond upon his reappointment, cease to be a de jure officer. (City of Peoria v. Industrial Board, 241 Ill. 812.) The Friedrich case has no application here.

The most that the petition shows is that petitioner was a de facto officer until he was discharged. Being only such, he was holding and exercising the functions of his office at the mere will of the village and could be removed at it at any moment the village might elect. Having never been appointed in the manner prescribed by law, and having never qualified, he was not a de jure officer, and is not entitled to the writ. (People ex rel. Bailey v. City of Chicago, supra.)

We do not care with the relation's contention that ordinances Nos. 486 and 487 are void. The alleges they were adopted for the purpose of discharging him without a hearing by the board of fire and police commissioners, and to evade the provisions of the Fire and Police Commissioners act and deprive him of its benefit and protection. People ex rel. Jacobs v. Griffin, supra, a civil service employee, regularly appointed in compliance with the provisions of the Civil Service Act, was suspended for thirty days, restored to the rolls, and again laid off. The records of the civil service commission showed that on the same day the position was abolished. Nevertheless, another party was appointed to perform the duties of the position. Under the act the petitioner could not be suspended for more than thirty days or discharged except for cause on written charges and a hearing. In holding



the petitioner was entitled to be restored, the court said that neither the city nor the civil service commission could legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person. In *City of Chicago v. Luthardt*, 191 Ill. 516, another civil service employee appointed in compliance with the act, sued for back salary for the period during which he was under an illegal charge, without charges preferred or a hearing. The common council had attempted to abolish the position by changing the title and making an appropriation for the position under the new name, but none under the old title. The court held the petitioner was entitled to recover. These cases are relied upon by relator. The distinguishing difference between them and the case at bar is that in each of those cases the petitioner's appointment was made in conformity with the requirements of the Civil Service Act, and he was entitled to hold his position until he was discharged for cause after a hearing upon written charges. That situation is not present in this case, and those decisions are not applicable here. In this case, the relator, being only a de facto officer, subject to discharge at any moment at the mere will of the village authorities, (*McNeill v. City of Chicago*, supra), had no tenure in the office and no rights or interest therein that could be affected by his discharge or by the enactment of either or both of the two ordinances. It is a familiar rule of law that one can not complain of something which does not affect him. It is manifest that the adoption of the Fire and Police Commissioners act by the Village could not change relator's status as only a de facto officer, or convert it from such an office to that of a "member" of the police department, under the meaning of that term as used in the act, but his status remained the same. If the ordinances were enacted with the purposes claimed, they are not invalid for that reason, because relator had no right to retain the office and no right

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191 Ill. 515, another civil service employee appointed in compliance with  
the act, and for back salary for the period during which he was under an  
illegal order, without charges preferred or a hearing. The common coun-  
cil had attempted to abolish the position by changing the title and mak-  
ing an appropriation for the position under the new name, but none under  
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between them and the case at bar is that in each of those cases the  
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of the Civil Service Act, and he was entitled to hold his position  
until he was discharged for cause after a hearing upon written charges.  
That situation is not present in this case, and those decisions are not  
applicable here. In this case, the petitioner, being under a false title  
order, subject to discharge at any moment at the discretion of the village  
authorities, (*McNeill v. City of Chicago*, supra), had no tenure in the  
office and no rights or interest therein that could be affected by his  
discharge or by the enactment of either or both of the two ordinances.  
It is a familiar rule of law that one can not complain of something which  
does not affect him. It is manifest that the adoption of the title and  
Police Order in honor set by the Village could not change the petitioner's status  
as only a de facto officer, or convert it from such an officer to that  
of a "member" of the police department, under the meaning of that term  
as used in the act, but his status remained the same. If the ordinances  
were enacted with the purpose claimed, they are not invalid for that  
reason, because the petitioner had no right to retain the office and no right

to a hearing before he could be discharged. There being nobody whose rights could be affected by abolishing the office of chief of police, the village had a right to abolish it. The statute provides for the office of village marshal, and it follows that the village had a right to create it. The allegation that the latter ordinance "did not actually abolish the office of Chief of Police but merely changed the title of the office to Village Marshal, and vested the same identical powers and duties formerly in the Chief of Police in the Village Marshal" is refuted by the terms of the ordinances themselves, which the petition purports to set in haec verba. Disregarding the fact that ordinance No. 456 expressly abolishes the office of chief of police and that ordinance No. 457 creates the office of village marshal, they show on their face that the powers and duties of the two officers are not the same, but differ in several material particulars. An allegation inconsistent with other facts alleged in the petition is of no force.

The petition does not show that relator is entitled to any of the relief prayed. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.



to a hearing before he could be discharged. There being nobody  
whose rights would be affected by abolishing the office of  
of police, the village had a right to abolish it. The statute  
provided for the office of village police, and it follows that  
the village has a right to create it. The allegation that the  
former ordinance "did not actually confer the office of Chief of  
Police but merely changed the title of the office to Village Marshal,  
and vested the same in actual powers and duties formerly in the Chief  
of Police in the Village Marshal is refuted by the terms of the ordi-  
nance themselves, which the petition purports to set on their heads.  
Regarding the fact that ordinance No. 487 created the office  
of Chief of Police and that ordinance No. 488 created the office  
of Village Marshal, they show on their face that the powers and duties  
of the two offices are not the same, and differ in several material  
particulars. An allegation inconsistent with other facts alleged in  
the petition is of no force.

The petition does not aver that reason is sufficient to set aside the  
judicial decree. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

41907

JOHN T. CLEGG,

Appellee,

v.

GEORGE R. GOULD and G. M. FULLER,

Defendants.

On Appeal of GEORGE R. GOULD,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

314 I.A. 670

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Circuit Court of Cook County on April 26, 1940, John T. Clegg alleged that on April 12, 1938 he loaned \$2,500, on July 1, 1938, \$35, and on July 2, 1938, \$185, a total of \$2,700, to George R. Gould and G. M. Fuller, defendants, which they promised to repay on April 12, 1940; and that they refused to pay. He asked judgment for \$2,700. George R. Gould was served with a writ of summons. G. M. Fuller was not served and did not appear. On July 6, 1940, George R. Gould filed an answer admitting that the defendants received the \$2,700, but denying that he was indebted to the plaintiff. With the answer, Gould filed a counterclaim, alleging that on April 12, 1938 plaintiff and defendants entered into a written contract. By the contract plaintiff agreed to loan to the defendants \$5,000, of which \$2,500 was loaned on the day it was executed. Plaintiff agreed to deliver the balance of \$2,500 within 120 days. Defendants agreed to pay plaintiff interest at 6 percent per annum and to repay the \$5,000 on April 12, 1940, plus "a bonus of \$1,000." Defendants agreed that upon demand at any time within the period of two years, they would "see" that plaintiff would "be offered a general agency contract in such territory as may be available, to handle Accident and Health and Life Insurance of the Great Northern Life Insurance Company of Milwaukee, Wisconsin". Defendants further agreed that in the territory turned over to plaintiff, any business which defendants "may have on their books in this territory at this time will be transferred, without cost," to plaintiff





and that plaintiff from that day on "will receive renewal commissions on this business". Defendant (counterclaimant) averred that plaintiff delivered \$2,700 under the contract, but although often requested so to do, failed to deliver to the defendants the balance of \$2,300 as contemplated by the contract; that at the time the contract was made, plaintiff knew that defendants had a contract with the Great Northern Life Insurance Company of Milwaukee whereby defendants were to create and build up insurance agencies to handle accident, health and life insurance business; and that plaintiff knew that in order to accomplish the object of their contract with the insurance company defendants would have to advance and expend large sums of money, and that the \$5,000 which was to be procured from plaintiff was to be used by them for that purpose; that he and Fuller, in reliance upon the promise of plaintiff to loan \$5,000, incurred obligations in the sum of \$10,000, and that by reason of the failure of plaintiff to "advance" the balance of the loan in the sum of \$2,300, defendants were unable to carry out their obligations. Counterclaimant further asserted that he and Fuller suffered damages in the sum of \$10,000, for which they asked judgment. Plaintiff, answering counterclaimant, admitted the execution of the contract, denied that counterclaimant requested him to pay the balance of \$2,300, and alleged that prior to the expiration of the 120 days mentioned in the contract, defendant Gould stated to him (plaintiff) that he should not pay over the balance of \$2,300; that Gould refused to accept the balance at that time; that Gould advised him (plaintiff) that difficulties had arisen between him (Gould) and Fuller. This answer also denied that plaintiff had any knowledge of any contract between the life insurance company and defendants, or that he knew that the \$5,000 mentioned in the contract was to be used for building up insurance agencies; and further denied that Gould and Fuller, relying upon the loan of \$5,000, entered into certain contracts and incurred certain obligations, and denied that Gould and Fuller failed to carry out their obligations because of their reliance on their contract with him. On December 31, 1940, the





court called the case for trial and had an order spread of record that "there has been no service of summons had upon the defendant G. M. Fuller". Thereupon, the court proceeded to hear evidence. The record shows that the trial was then discontinued. This was because the attorney for the plaintiff became ill. On February 24, 1941 the case was tried before another judge, who found the issues for plaintiff and against the defendants George H. Gould and G. M. Fuller, and assessed plaintiff's damages at the sum of \$2,700. He also found the issues for the plaintiff and against the counterclaimant, George H. Gould, as to his counterclaim, and entered judgment for the plaintiff and against George H. Gould and G. M. Fuller for \$2,700 and costs. George H. Gould appealed.

The first criticism leveled at the judgment is that plaintiff's complaint does not support the judgment. He relies upon the provisions of Sec. 35 of the Civil Practice Act (Sec. 160, Ch. 110, Ill. Rev. Stat. 1941) and argues that as plaintiff did not attach a copy of the contract to his complaint, the court should have refused to enter judgment. Defendant also contends that this section of the Practice Act is mandatory and requires the written instrument upon which the action is founded to be attached to the complaint, or that the complaint recite the instrument or the material portions of it. Plaintiff meets this argument by reciting Par. 3 of Sec. 42 of the Civil Practice Act (Par. 3, Sec. 166, Ch. 110, Ill. Rev. Stat. 1941) that "all defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived." We have searched the record and cannot find that defendant objected to the complaint in the trial court. Apparently, he was satisfied that it stated a cause of action against him and he relied on his counterclaim. We have frequently held that propositions not raised in the trial court cannot be urged on appeal.

The second point presented by defendant is that the trial court erred in entering judgment for \$2,700 as against both defendants, when only one was served. A perusal of the record convinces us that





the entry of the judgment against Fuller was because of a mistake. The court had previously found that Fuller was not served. The judgment against Fuller is, of course, a nullity. We do not see how the fact that a judgment was erroneously entered against Fuller prejudiced Gould. Plaintiff's claim against the defendants was joint and several. Furthermore, Sec. 27 of the Civil Practice Act (Sec. 151, Ch. 110, Ill. Rev. Stat. 1941) provides that "when several joint debtors are sued, and any one or more of them shall not be served with process, the pendency of such suit or the recovery of a judgment against the parties served shall not be a bar to a recovery on the original cause of action against such as are not served, in any action which may be thereafter brought. This section shall not be so construed as to allow more than one satisfaction". Moreover, defendant did not urge this point in the trial court and will not be permitted to do so here. The third point advanced by defendant is that the court erred in entering the joint judgment against him. He contends that the complaint states a cause of action on a joint liability of two defendants and that judgment must be rendered against both or none. Our discussion of the previous point answers this point.

Defendant maintains that the judgment is against the manifest weight of the evidence. A careful reading of the transcript convinces us that this point is without merit. The court saw and heard the witnesses and in our opinion was fully justified in entering the finding and judgment.

Finally, defendant insists that the judgment is not supported by the record. In arguing this proposition defendant refers to the points heretofore discussed. Our view is that the record supports the judgment. For these reasons the judgment of the Circuit Court of Cook County is affirmed as to George H. Gould. The Circuit Court has ample power to expunge that part of its record showing the judgment entered by mistake against G. M. Fuller.

JUDGMENT AFFIRMED.

NEBEL AND KILEY, JJ. CONCUR.





42106

FAY WEINER,

Appellant,

v.

RICHARD M. KJELSTAD,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Modified  
Opinion

314 I.A. 671

Abstract

opinion  
ref. 6-18-42

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Fay Weiner filed a complaint in the Superior Court of Cook County against Richard M. Kjelstad to recover damages for personal injuries growing out of an accident on April 17, 1940, at the intersection of Milwaukee and Spaulding Avenues in Chicago. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of \$300. Plaintiff moved for a new trial and defendant moved for a judgment non obstante verdicto. Both motions were denied and judgment was entered on the verdict. Plaintiff asks that the judgment be reversed and that she be allowed a new trial.

Plaintiff's theory of the case is that she was crossing the intersection of Milwaukee and Spaulding Avenues, at the west crosswalk, in a southerly direction; that she was at all times in the exercise of due care and caution for her own safety; that the defendant, who was operating his automobile in a southeasterly direction on Milwaukee Avenue, caused his motor vehicle to run into, upon and against plaintiff; that the defendant did not blow his horn or give any signal of the approach of his automobile; that the defendant failed to keep his motor vehicle under proper and sufficient control; that the defendant was watching the plaintiff continually from the time he first saw her walking across until his automobile struck her; that he otherwise operated his automobile in a careless, negligent and reckless manner and so as to exhibit wilfulness and wantonness; that plaintiff was seriously and permanently injured and expended considerable sums

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of money in hospital and medical bills, together with substantial loss in earnings and income; that the verdict and judgment is shockingly inadequate and unjust and plainly not based upon the evidence or the law; that there is no basis in law, common sense or justice to support the amount of the verdict and judgment thereon as to the damages, and that plaintiff should have been granted a new trial; and that other errors were committed which justified the granting of a new trial. Defendant's theory of the case is that plaintiff was crossing Milwaukee Avenue going south on the west crosswalk of Spaulding Avenue; that she had a clear view to the west for about a block; that she never saw the automobile of defendant which was in full and plain view and was seen by other persons; that defendant was traveling at a reasonable speed; that he gave her warning by his horn two or three times; that he did everything he could to avoid the accident; that the plaintiff did nothing whatever to attempt to avoid the accident, and that she walked into the left front door of defendant's car; that the accident was caused solely by plaintiff's own negligence or wilful and wanton conduct; that defendant was at all times in the exercise of due care and plaintiff was not entitled to any damages; that plaintiff had no serious injuries; that the evidence as to her damages and injuries was so conflicting and so exaggerated as to lead the jury to have serious and justifiable doubts as to the truth of any of it; and that plaintiff had a fair trial, and that she had no reason to complain of receiving \$300 more than she was entitled to.

Milwaukee Avenue, a street car thoroughfare, extends northwest and southeast and is about 40 feet wide at Spaulding Avenue. Spaulding Avenue extends straight north and south and is not as wide as Milwaukee Avenue. The latter has street car tracks for both northwest and southeast bound street cars. Plaintiff, a woman 33 years of age, was walking across Milwaukee Avenue at the west crosswalk



[illegible]

from the north to the south side of the street. At the time of the occurrence, the motor vehicle was being driven by the defendant in a southeasterly direction on Milwaukee Avenue. On arriving at the corner, plaintiff looked both east and west. She saw a street car about a block and a half to the northwest, which was proceeding in a southeasterly direction. Automobiles proceeding in the same direction were following the street car. She testified that she did not see the automobile of defendant at any time until the accident occurred, although her view to the west was not obstructed. Plaintiff was crossing where people usually cross. She worked at Ruben's Women's Apparel Shop, 1314 Milwaukee Avenue, and was crossing the street for the purpose of boarding a street car which would convey her to her place of employment. She testified she heard no horn or signal before she was struck; that she "just took a few steps and just took my eyes up and there was a machine". The next thing she remembered she was in bed in a hospital. She further testified that after leaving the sidewalk she "took three or four steps on the street and there was the machine on top of me". Answering the question, "When you say on top of you, do you mean at the point of impact?", she answered, "Yes". In answer to the question, "Do you know what part of the car came in contact with you?", she answered, "I believe it was the front fender". She was then asked, "Right or left side?", and answered, "I was going this way [indicating] and he was going this way, that side [indicating]". She was then asked, "I assume by that you mean the left side?", and she answered, "About the left door". Defendant testified that he was traveling in a southeasterly direction on Milwaukee Avenue; that he had stopped alongside of a street car at the block west of Spaulding Avenue; that he started up at the same time as the street car and passed it, and was then straddling the inner rail of the eastbound street car track; that he was going about 20 or 25 miles an hour; that he saw plaintiff start to cross the street when he was about 50 feet from Spaulding Avenue; that he then

from the north to the south side of the street. At the time of the  
accident, the motor vehicle was being driven by the defendant in  
a southerly direction on Illinois Avenue. On arriving at the  
corner, defendant looked both east and west. The new street car  
about a block and a half to the northwest, which was proceeding in  
a southerly direction. Automobiles proceeding in the same  
direction were following the street car. One testified that she did  
not see the automobile of defendant at any time until the accident  
occurred, although her view to the west was not obstructed. Plaintiff  
was crossing where people usually cross. She worked at "John's Town",  
general shop, 1115 Illinois Avenue, and was crossing the street for  
the purpose of crossing a street car which would convey her to her  
place of employment. One testified she heard no horn or signal  
before she was struck; that she "just took a few steps and just took  
my eyes up and there was a machine". The next thing she remembered  
she was in bed in a hospital. One further testified that after leaving  
the sidewalk she "looked three or four steps on the street and there  
was the machine on top of me". Answering the question, "when you say  
on top of you, do you mean at the point of impact?", she answered,  
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came in contact with you?", she answered, "I believe it was the front  
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was going this way [indicating] and he was going this way, that side  
[indicating]". She was then asked, "I assume by that you mean the  
left side?", and she answered, "About the left hand".  
Testified that he was traveling in a southerly direction on  
Illinois Avenue; that he had stopped alongside of a street car at  
the block west of Spaulding Avenue; that he started up at the same  
time as the street car and passed it, and was then spreading the  
inner rail of the eastbound street car track; that he was going about  
50 or 60 miles an hour; that he saw plaintiff start to cross the  
street when he was about 50 feet from Spaulding Avenue; that he then



slowed down and blew his horn; that he blew his horn again and put his foot on the brakes and swerved to the right when he was about 15 feet from her; that he realized that she was going to continue on; that she walked into the left front door of the car. Walter Muehr, called by plaintiff, testified that he was employed as a janitor for a building in the vicinity; that he was 25 or 30 feet from the southwest corner at the time of the occurrence, walking south on the west crosswalk of Spaulding Avenue; that he did not see defendant's automobile until plaintiff was hit; that he heard a scream; that she was lying on the northwest bound street car tracks; that the first time he saw plaintiff was when she was lying on the ground; that he did not hear any horn or see any signal given, and that the automobile stopped 25 or 30 feet from the scene of the accident. Joseph Towelski, another witness called by plaintiff, testified that he saw an automobile (defendant's) come from behind the street car; that the front bumper, left side of the automobile, hit the lady who was crossing the street there; that he did not hear any horn or signal. On cross-examination, this witness reiterated that "the front bumper, left side, came in contact with the girl". He further testified that the driver drove around the corner and stopped; that the view of the street was unobstructed and that he was able to see the automobile coming without trouble.

Plaintiff was taken to the Belmont Hospital, where she was treated by Dr. Saul Kaufman. When he first examined her, she was in bed in a semi-conscious state. Blood was running all over her nose, left eye and lip. Morphine and glucose solutions were injected into the veins. On the following day blood was still coming from the eye, nose and lip. The torn skin tissue above the eye was removed, the lip was sewed and the eye and lip were bandaged. Both eye tendons were brought together. There were 14 to 18 sutures put over the eye and 6 to 8 sutures in the lip. Plaintiff complains of dizziness,

always seen and blew his nose; that he knew his own name and that his  
front on the bridge and turned to the right when he was about to pass  
from left to right; that he realized that he was going to continue on; that  
he walked into the left front door of the car. After that, called  
by himself, testified that he was employed as a janitor for a building  
in the vicinity; that he was 20 or 25 feet from the accident; that  
at the time of the occurrence, seeing people on the west sidewalk of  
Main Street; that he did not see defendant's automobile until  
plaintiff was hit; that he heard a woman; that he was lying on the  
ground; that he did not see defendant; that the first time he saw plaintiff  
was when she was lying on the ground; that he did not hear any noise or  
see any alarm given, and that the automobile stopped 20 or 25 feet  
from the scene of the accident. James Towler, another witness  
called by plaintiff, testified that he saw an automobile (defendant's)  
come from behind the street car; that the front bumper, left side of  
the automobile, hit the lady who was crossing the street; that  
he did not hear any alarm or signal. On cross-examination, this witness  
testified that the front bumper, left side, came in contact with  
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left eye and lip. Mucous and glaucous solutions were injected into  
the veins. On the following day blood was still coming from the eye,  
nose and lip. The torn skin flaps above the eye were removed, the  
lip was sewed and the eye and lip were bandaged. Both eye flaps  
were brought together. There were 14 to 15 sutures put over the eye  
and 6 to 8 sutures in the lip. Plaintiff complains of blindness

headaches and bad hearing in her left ear. Some of her teeth were loosened in the accident. She remained in the hospital and in bed for 11 or 12 days, where she received treatment to her head, back and left leg. At the hospital she was strapped for traumatic pleurisy, and the straps were kept on about 10 days. The doctor found that she had sustained a cerebral concussion with rupture of a cerebral blood vessel, traumatic pleurisy, sprain of the sacro-illiac joint, secondary anemia and marked contusion or laceration of the left leg. After she was removed to her home the physician treated her there for about 6 weeks, giving her infra-red treatments for the chest, back, lower spine and head. For pain and sleeplessness she was given sedatives, and liver extract and tablets for anemia and the loss of blood. After being treated at her home for six weeks, she went to the doctor's office every week until the first of the following year and received treatments for the pains in her head and the anemia. She made about 80 visits to the doctor's office and was still under his care at the time of the trial. In May, 1941, Dr. Kaufman sent her to Dr. Sigmund Krumholz, a psychiatrist. She paid Dr. Kaufman \$100 on account of his bill of \$340. She received dental care of her teeth which had been loosened in the accident, and a new bridge was made to replace the one that had been broken. She was also treated in April, 1940 by a Dr. Abelio, whom she saw 3 or 4 times. She testified that she weighed 123 pounds before the accident, and that at the time of the trial she weighed 107 pounds; that she cannot see as well as before the occurrence; that before the accident she wore glasses only when she read, and that subsequent to the accident she was fitted for other glasses. She testified that she had scars on her face about the left eye and lower lip and on her left leg. She suffers from headaches and dizziness about once every week and suffers from general weakness. Dr. Kaufman testified that in his opinion the condition from which she was suffering was permanent. Plaintiff



...and ... in her left ... of the fourth year  
... in the ... . The ... in the ... and it was  
... 11 or 12 days, when she received treatment to her back, neck  
and left leg. At the hospital she was attended by ...  
and the ... was sent on about 12 days. The ... found that  
she had sustained a cerebral contusion with rupture of a cerebral  
blood vessel, traumatic epilepsy, rupture of the cardio-illiac joint,  
extremity emphyse and marked contusion of localization of the left leg.  
After she was removed to her home the physician treated her there for  
about 6 weeks, giving her internal treatments for the chest, back,  
lower spine and head. For pain and sleeplessness she was given  
sedatives, and liver extract and vitamin for general and the loss of  
blood. After being treated at her home for six weeks, and sent to  
the doctor's office every week until the first of the following year.  
and received treatment for the spine in her back and the shoulder.  
She went about 50 miles to the doctor's office and was still under  
his care at the time of the trial. In May, 1911, Dr. ... and  
her to Dr. ... a specialist. ... Dr. ...  
... of his bill of 1910. She received dental care of her  
teeth which had been loosened in the accident, and a new bridge was  
made to replace the one that had been broken. She was also treated  
in April, 1910 by a Dr. ... whom she saw 5 or 6 times. She  
testified that she weighed 115 pounds before the accident, and that  
at the time of the trial she weighed 107 pounds; that she cannot see  
as well as before the accident; that before the accident she wore  
glasses only when she read, and that subsequent to the accident she  
was fitted for other glasses. She testified that she had scars on  
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suffered from headaches and dizziness about once every week and ...  
from general weakness. Dr. ... testified that in his opinion  
the condition from which she was suffering was permanent. ...

maintains that the actual expense incurred by her amounted to \$1,091.30, made up of Dr. Kaufman's bill for \$340, the hospital bill of \$139, and the loss of \$612, which she would have earned during 17½ weeks at an average of \$35 a week.

Plaintiff urges that the amount of the verdict is grossly and wholly inadequate and manifestly against the weight of the evidence relative to the actual damages and losses and the physical injuries sustained by her, and that it is obvious that the jury disregarded competent and credible testimony, ignored the court's instructions, and failed to take into consideration proper elements of damages clearly proven. In reply to this contention defendant asserts that the verdict was not inadequate; that plaintiff was guilty of contributory negligence which was the proximate cause of the accident, and that as she is not entitled to recover at all, she cannot complain that the verdict in her favor is inadequate. Defendant maintains that there was a serious conflict in the evidence as to what plaintiff was suffering from, and as to whether she suffered any damage of consequence, and calls attention to the cross-examination of Dr. Kaufman, who testified that his diagnosis of secondary anemia was based on the excessive loss of blood from the areas that were bleeding. He did not recall using the hemoglobin or blood count when he made his diagnosis. Dr. Kaufman conceded that X-ray is one of the means of determining whether there is pneumonia or pleurisy. He did not claim to have any X-ray evidence to substantiate his claim of pleurisy, and Dr. Hansen, defendant's witness, testified that plaintiff's exhibits 2 and 4 were negative of any evidence of pathology and concurred in the statement of Dr. Kaufman that pleurisy could be seen in an X-ray film if it were in fact present. Dr. Kaufman further admitted that if there was a separation of the sacro-illiac joint, it would appear in the X-ray of the patient. He did not remember whether it appeared in the X-ray. As far as he knew, it did not. Dr. Hansen testified positively that it did not appear.





Dr. S. I. Weiner, called by plaintiff, testified that if there is very slight hemorrhages or very slight fluid in the pleura, or if the pleura has not had a chance to become thickened over a sufficient length of time, the X-ray will not show it, and that a simple sprain of the sacro-iliac joint cannot be diagnosed in a X-ray picture. It was also claimed that plaintiff was suffering from tachycardia, which was defined by Dr. Kaufman as an acceleration of the heart, or a rapid heart. On Cross-examination, he testified that she suffered from shock, caused by loss of blood. He stated that one of the symptoms of shock is slow pulse. Defendant argues that this testimony is contradictory in that it shows the patient as having a slow pulse and a rapid heart beat at the same time. Defendant also points out that Dr. Kaufman testified that plaintiff's blood pressure was 90 over 60 diastolic, which he said was a normal ratio, and that when confronted by the record of the interne that the blood pressure was 128 over 82 on the same day that she came in, said that this was normal. Plaintiff testified that she worked at Ruben's store for 3 years before the accident, selling dresses, coats and other articles of apparel and that she worked steadily in the year prior to the accident. It developed later; however, that for 8½ months she had been in California, with the exception of 2 or 3 weeks she had worked before the accident. She testified on direct examination that her average earnings were approximately \$40 a week. On cross-examination, she admitted that she made \$22 a week, and that at no time, even during the weeks around Christmas, the best in the year in that business, did she make \$40 a week. The contention of defendant as to her earnings is supported by the earning record of her employer. Defendant argues that the jury had the right to conclude, and rightfully concluded, that the injuries suffered were of a minor character and that she attempted to build up her injuries and damages far beyond their real stature.

Dr. J. J. Walker, called as plaintiff, testified that it seems in  
very slight likelihood or very slight that in the future, or in  
the future has not had a chance to become involved over a settlement  
in the future, the future will not know it, and that a slight chance  
of the same thing being done is diagnosed in a future future. It  
was also stated that plaintiff was suffering from tuberculosis,  
which was defined by Dr. Hansen as an accumulation of the heart, or  
a heart heart. On cross-examination, he testified that the entire  
heart heart, caused by loss of blood. He stated that one of the symptoms  
of blood is also called. Defendant argues that this testimony is  
conclusory in that it shows the patient as having a slow pulse and  
a weak heart beat at the same time. Defendant also claims that some  
Dr. Hansen testified that plaintiff's blood pressure was 90 over 50  
diastolic, which he said was a normal rate, and that when tested  
by the record of the instance that the blood pressure was 100 over 90  
on the same day that the same in, said that this was normal. Plaintiff  
testified that he worked at woman's store for 3 years before the  
accident, selling dresses, coats and other articles of apparel and that  
he worked steadily in the year prior to the accident. It developed  
later, however, that for 25 months he had been in California, after  
the accident of 3 or 4 weeks and had worked before the accident. The  
testified on direct examination that her average earnings were  
approximately \$40 a week. On cross-examination, she admitted that she  
made \$20 a week, and that at no time, even during the week around  
Christmas, she had in the year in that business, did she make \$40  
a week. The contention of defendant as to her earnings is supported  
by the evidence presented at her employer. Defendant argues that the jury  
has the right to conclude, and rightfully concluded, that the injuries  
suffered were of a minor character and that she attempted to build up  
her injuries and recover far beyond their real extent.

At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions in tort were insufficient. The rule in Illinois is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. (Montgomery v. Simon, 309 Ill. App. 516.) Before the jury could award any damages to plaintiff, they first had to determine that defendant was guilty of the negligence charged, that such negligence was the proximate cause of the injuries suffered, and that <sup>she</sup> ~~was~~ in the exercise of ordinary care for her own safety at and about the time of the occurrence. The fact that the jury found the defendant guilty and awarded damages in the sum of \$300 normally would indicate that they found in her favor on the question of liability, and that they disbelieved the testimony introduced in her behalf as to her injuries. A careful perusal of the transcript convinces us that despite the effort to exaggerate plaintiff's personal injuries and loss of salary, she did suffer substantial injuries and loss of salary, and that the sum of \$300 awarded to her as damages is wholly inadequate and manifestly against the weight of the evidence. Nevertheless, we agree with the contention of the defendant that the verdict should not be set aside, and that the evidence clearly shows that plaintiff was guilty of contributory negligence which proximately caused the accident. ✓ Her testimony is that she was walking south on the crosswalk when she was struck by defendant's automobile. She admits that she did not see the automobile until the impact occurred. Defendant testified that she walked into the left door of his automobile. Her testimony corroborates the testimony of defendant in this respect. A witness introduced by plaintiff, Joseph Towelski, testified that he saw the defendant pass the street car at Diversey Avenue, a block away, that the view of the street was unobstructed, and that he was able to see the automobile coming without any trouble. The evidence clearly shows



at common law has been held to be sufficient upon the ground  
that the evidence allowed by the jury in actions to test the  
evidence. The rule in Illinois is that a jury trial may be granted  
where the verdict is likely to be influenced, for the reason that the  
government where the verdict is unfavorable. (Illinois v. State, 200  
Ill. App. 2d.) Before the jury could award any damages to plaintiff,  
they first had to determine that defendant was guilty of the  
negligence charged, that such negligence was the proximate cause of  
the injuries suffered, and that <sup>the</sup> there was in the nature of ordinary care  
for her own safety at and about the time of the occurrence. The  
fact that the jury found the defendant guilty and awarded damages  
in the sum of \$200 necessarily would indicate that they found in her  
favor on the question of liability, and that they considered the  
testimony introduced in her behalf as to her injuries. A verdict  
in favor of the plaintiff couched in such terms is the effort to  
express plaintiff's personal injuries and loss of salary, and did  
entail substantial injuries and loss of salary, and that the up of  
\$200 awarded to her on damages is wholly inadequate and manifestly  
against the weight of the evidence. Nevertheless, we agree with the  
contention of the defendant that the verdict should not be set aside,  
and that the evidence clearly shows that plaintiff was guilty of  
contributory negligence which proximately caused the accident. Her  
testimony is that she was walking south on the sidewalk when she was  
struck by defendant's automobile. She swears that she did not see  
the automobile until the instant occurred. Defendant testified that  
she walked into the left door of his automobile. Her testimony  
corroborates the testimony of defendant in this respect. A witness  
introduced by plaintiff, Joseph J. Lark, testified that he saw the  
defendant near the street car at Elverson Avenue, a block away, that  
the view of the street was unobstructed, and that he was able to see  
the automobile coming without any trouble. The evidence clearly shows

that the proximate cause of the accident was the fact that plaintiff walked into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door, and that she was not in the exercise of due care for her own safety. A similar situation arose in the case of Isley v. McClandish, 299 Ill. App. 564, where an appeal was taken by the plaintiff from a judgment of \$300 in her favor for the death of a seven year old child. Plaintiff complained of the inadequacy of the damages. The court in affirming the judgment, quoted with approval from O'Malley v. Chicago City Railway Company, 33 Ill. App. 354, 355:

"It may be conceded that the action of the jury was inconsistent, but the concession would furnish no consistent reason for inconsistency in the action of the court. \* \* \* A plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant set aside. \* \* \*; nor one in his or her own favor, because the damages awarded are less than the pecuniary injury."

In overruling the motion for a new trial in the instant case, the trial judge remarked: "Now, in some of the earlier cases where they have questioned the allowance for a new trial on the inadequacy of the damages, and held where it was not improper to deny the new trial on the question of liability, Judge Gary very aptly said, as far back as 31 [33] Appellate, that if the verdict is inconsistent because of the inadequacy of the damages it would not be wise to add another inconsistency to grant a new trial where the plaintiff was exceedingly fortunate in getting any amount of damage. I think, in view of these facts, I will deny the motion for a new trial." The evidence does not show that the defendant is liable. However, he is not asking for any relief from the judgment, and we are of the opinion that substantial justice will be accomplished by allowing the judgment to stand.

Plaintiff also argues that the court erred in sustaining objections to hypothetical questions propounded to her medical witness, and that the jury was influenced by passion and prejudice in their deliberations and in arriving at their verdict. Having found that

that the proximate cause of the accident was the fact that plaintiff called into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door, and that she was not in the exercise of due care for her own safety. A similar situation arose in the case of Hay v. Henderson, 25 Ill. App. 354, where an appeal was taken by the plaintiff from a judgment of \$500 in her favor for the death of a seven year old child. Plaintiff contended of the inadequacy of the damages. The court in affirming the judgment, noted with approval from O'Leary v. Chicago City Street Car Co., 55 Ill. App. 354, 355:

"It may be conceded that the action of the jury was incorrect, but the conclusion would turn on no substantial reason for inconsistency in the action of the court. Plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant and still, '... and in all the other cases, because the damages awarded are less than the pecuniary injury.'"

In reversing the action for a new trial in the instant case, the trial judge remarked: "Now, in some of the earlier cases where juries have questioned the allowance for a new trial on the inadequacy of the damages, and held there it was not improper to grant the new trial on the question of liability, judgment very rarely said, as far back as 21 Ill. App. 354, that if the verdict is inconsistent because of the inadequacy of the damages it would not be right to set aside the judgment to grant a new trial where the plaintiff was inadequately fortunate in getting any amount of damages. I think, in view of these facts, I will deny the motion for a new trial. The evidence does not show that the defendant is liable. However, as is well known for my relief from the judgment, and we are of the opinion that substantial justice will be accomplished by affirming the judgment as made."

Plaintiff also argues that the court erred in sustaining objections to hypothetical questions propounded to her counsel at trial, and that the jury was influenced by passion and prejudice in their deliberations and in arriving at their verdict. Having found that



the evidence shows that the proximate cause of the injuries suffered was plaintiff's own negligence, it is unnecessary for us to discuss these points. Plaintiff also complains of the action of the court in striking that part of her complaint which charged the defendant with wilful and wanton conduct. We agree with the defendant that there was no evidence tending to support the charge of wilful and wanton conduct, and the court properly struck that part of her complaint.

Because of the views expressed, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.



42106

FAY WEINER,

Appellant,

v.

RICHARD M. KJELSTAD,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

314 I.A. 671<sup>2</sup>

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Fay Weiner filed a complaint in the Superior Court of Cook County against Richard M. Kjelstad to recover damages for personal injuries growing out of an accident on April 17, 1940, at the intersection of Milwaukee and Spaulding Avenues in Chicago. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of \$300. Plaintiff moved for a new trial and defendant moved for a judgment non obstante verdicto. Both motions were denied and judgment was entered on the verdict. Plaintiff asks that the judgment be reversed and that she be allowed a new trial.

Plaintiff's theory of the case is that she was crossing the intersection of Milwaukee and Spaulding Avenues, at the west crosswalk, in a southerly direction; that she was at all times in the exercise of due care and caution for her own safety; that the defendant, who was operating his automobile in a southeasterly direction on Milwaukee Avenue, caused his motor vehicle to run into, upon and against plaintiff; that the defendant did not blow his horn or give any signal of the approach of his automobile; that the defendant failed to keep his motor vehicle under proper and sufficient control; that the defendant was watching the plaintiff continually from the time he first saw her walking across until his automobile struck her; that he otherwise operated his automobile in a careless, negligent and reckless manner and so as to exhibit wilfulness and wantonness; that plaintiff was seriously and permanently injured and expended considerable sums of money in hospital and medical bills.



THE COURT

Defendant

v.

Plaintiff

Witness

THE COURT

THE COURT

111

8141.A.671

Plaintiff's theory of the case is that she was driving the intersection of Milwaukee and Springfield Avenues, at the west crosswalk, in a southerly direction; that she was at all times in the exercise of due care and caution for her own safety; that the defendant, who was operating his automobile in a southerly direction on Milwaukee Avenue, caused his motor vehicle to run into upon and against Plaintiff; that the defendant did not blow his horn or give any signal of the approach of his automobile; that the defendant failed to keep his motor vehicle under proper and sufficient control; that the defendant was watching the Plaintiff continually from the time he first saw her walking across until his automobile struck her; that he otherwise operated his automobile in a careless, negligent and reckless manner and so as to exhibit ill-will and vengeance; that Plaintiff was seriously and permanently injured and expended considerable sums of money in hospital and medical bills.

Plaintiff asks that the judgment be reversed and that she be allowed a new trial.

Plaintiff's theory of the case is that she was driving the intersection of Milwaukee and Springfield Avenues, at the west crosswalk, in a southerly direction; that she was at all times in the exercise of due care and caution for her own safety; that the defendant, who was operating his automobile in a southerly direction on Milwaukee Avenue, caused his motor vehicle to run into upon and against Plaintiff; that the defendant did not blow his horn or give any signal of the approach of his automobile; that the defendant failed to keep his motor vehicle under proper and sufficient control; that the defendant was watching the Plaintiff continually from the time he first saw her walking across until his automobile struck her; that he otherwise operated his automobile in a careless, negligent and reckless manner and so as to exhibit ill-will and vengeance; that Plaintiff was seriously and permanently injured and expended considerable sums of money in hospital and medical bills.

together with substantial loss in earnings and income; that the verdict and judgment is shockingly inadequate and unjust and plainly not based upon the evidence or the law; that there is no basis in law, common sense or justice to support the amount of the verdict and judgment thereon as to the damages, and that plaintiff should have been granted a new trial; and that other errors were committed which justified the granting of a new trial. Defendant's theory of the case is that plaintiff was crossing Milwaukee Avenue going south on the west crosswalk of Spaulding Avenue; that she had a clear view to the west for about a block; that she never saw the automobile of defendant which was in full and plain view and was seen by other persons; that defendant was traveling at a reasonable speed; that he gave her warning by his horn two or three times; that he did everything he could to avoid the accident; that the plaintiff did nothing whatever to attempt to avoid the accident, and that she walked into the left front door of defendant's car; that the accident was caused solely by plaintiff's own negligence or wilful and wanton conduct; that defendant was at all times in the exercise of due care and plaintiff was not entitled to any damages; that plaintiff had no serious injuries; that the evidence as to her damages and injuries was so conflicting and so exaggerated as to lead the jury to have serious and justifiable doubts as to the truth of any of it; and that plaintiff had a fair trial, and that she had no reason to complain of receiving \$300 more than she was entitled to.

Milwaukee Avenue, a street car thoroughfare, extends northwest and southeast and is about 40 feet wide at Spaulding Avenue. Spaulding Avenue extends straight north and south and is not as wide as Milwaukee Avenue. The latter has street car tracks for both northwest and southeast bound street cars. Plaintiff, a woman 33 years of age, was walking across Milwaukee Avenue at the west crosswalk from the north to the south side of the street. At the time of the occurrence, the motor vehicle was being driven by the defendant in

together with substantial loss in earnings and income; that the  
verdict and judgment is shockingly inadequate and unjust and clearly  
not based upon the evidence on the facts; that there is no basis in  
law, common sense or justice to support the award of the verdict and  
judgment thereon as to the damages, and that plaintiff should have  
been granted a new trial; and that other errors were committed which  
justified the granting of a new trial. Defendant's theory of the case  
is that plaintiff was crossing Milwaukee Avenue going south on the  
west crosswalk of Paulina Avenue; that she had a clear view to the  
west for about a block; that she never saw the automobile of defendant  
which was in full and plain view and was seen by other persons; that  
defendant was traveling at a reasonable speed; that he gave her warning  
by his horn two or three times; that he did everything he could to  
avoid the accident; that the plaintiff did nothing whatever to avoid  
to avoid the accident, and that she walked into the left front door  
of defendant's car; that the accident was caused solely by plaintiff's  
own negligence or willful and wanton conduct; that defendant was at all  
times in the exercise of due care and plaintiff was not entitled to  
any damages; that plaintiff had no injuries or damages; that the evidence  
as to her damages and injuries was so conflicting and so exaggerated  
as to lead the jury to have serious and justifiable doubts as to  
the truth of any of it; and that plaintiff had a fair trial, and that  
she had no reason to complain of receiving \$500 more than she was  
entitled to.

Milwaukee Avenue, a street one hundred feet wide, extends north-  
west and southeast and is about 55 feet wide at Paulina Avenue.  
Paulina Avenue extends straight north and south and is not as wide  
as Milwaukee Avenue. The latter has street car tracks for both north-  
west and southeast bound street cars. Plaintiff, a woman 35 years  
of age, was walking across Milwaukee Avenue at the west crosswalk  
from the north to the south side of the street. At the time of the  
occurrence, the motor vehicle was being driven by the defendant in



a southeasterly direction on Milwaukee Avenue. On arriving at the corner, plaintiff looked both east and west. She saw a street car about a block and a half to the northwest, which was proceeding in a southeasterly direction. Automobiles proceeding in the same direction were following the street car. She testified that she did not see the automobile of defendant at any time until the accident occurred, although her view to the west was not obstructed. Plaintiff was crossing where people usually cross. She worked at Ruben's Women's Apparel Shop, 1314 Milwaukee Avenue, and was crossing the street for the purpose of boarding a street car which would convey her to her place of employment. She testified she heard no horn or signal before she was struck; that she "just took a few steps and just took my eyes up and there was a machine". The next thing she remembered she was in bed in a hospital. She further testified that after leaving the sidewalk she "took three or four steps on the street and there was the machine on top of me". Answering the question, "When you say on top of you, do you mean at the point of impact?", she answered, "Yes". In answer to the question, "Do you know what part of the car came in contact with you?", she answered, "I believe it was the front fender". She was then asked, "Right or left side?", and answered, "I was going this way [indicating] and he was going this way, that side [indicating]". She was then asked, "I assume by that you mean the left side?" and she answered, "About the left door." Defendant testified that he was traveling in a southeasterly direction on Milwaukee Avenue; that he had stopped alongside of a street car at the block west of Spaulding Avenue; that he started up at the same time as the street car and passed it, and was then straddling the inner rail of the eastbound street car track; that he was going about 20 or 25 miles an hour; that he saw plaintiff start to cross the street when he was about 50 feet from Spaulding Avenue; that he then slowed down and blew his horn; that he blew his horn again and put his foot on the brakes and swerved to the right



when he was about 15 feet from her; that he realized she was going to continue on; that she walked into the left front door of the car. Walter Muehr, called by plaintiff, testified that he was employed as a janitor for a building in the vicinity; that he was 25 or 30 feet from the southwest corner at the time of the occurrence, walking south on the west crosswalk of Spaulding Avenue; that he did not see defendant's automobile until plaintiff was hit; that he heard a scream; that she was lying on the northwest bound street car tracks; that the first time he saw plaintiff was when she was lying on the ground; that he did not hear any horn blow or any signal given, and that the automobile stopped 25 or 30 feet from the scene of the accident. Joseph Towelski, another witness called by plaintiff, testified that he saw an automobile (defendant's) come from behind the street car; that the front bumper, left side of the automobile, hit the lady who was crossing the street there; that he did not hear any horn or signal. On cross-examination, this witness reiterated that "the front bumper, left side, came in contact with the girl". He further testified that the driver drove around the corner and stopped; that the view of the street was unobstructed and that he was able to see the automobile coming without trouble.

Plaintiff was taken to the Belmont Hospital, where she was treated by Dr. Saul Kaufman. When he first examined her, she was in bed in a semi-conscious state. Blood was running all over her nose, left eye and lip. Morphine and glucose solutions were injected into the veins. On the following day blood was still coming from the eye, nose and lips. The torn skin tissue above the eye was removed, the lip was sewed and the eye and lip were bandaged. Both eye tendons were brought together. There were 14 to 18 sutures put over the eye and 6 to 8 sutures in the lip. Plaintiff complains of dizziness, headaches and bad hearing in her left ear. Some of her teeth were



when he was about 15 feet from her; that he noticed her was going to continue on; that she walked into the left front door of the car. After seeing, called by Plaintiff, testified that he was employed as a janitor for a building in the vicinity; that he was 25 or 30 feet from the southwest corner at the time of the occurrence, walking south on the west crosswalk of Columbia Avenue; that he did not see defendant's automobile until Plaintiff was hit; that he heard a boom; that she was lying on the northwest corner street car tracks; that the first time he saw Plaintiff was when she was lying on the ground; that he did not hear any horn blow or any signal given, and that the automobile stopped 15 or 20 feet from the scene of the accident. Joseph Towalski, another witness called by Plaintiff, testified that he saw an automobile (defendant's) come from behind the street car; that the front bumper, left side of the automobile, hit the lady who was crossing the street there; that he did not hear any horn or signal. On cross-examination, this witness testified that the front bumper, left side, came in contact with the girl. He further testified that the driver drove around the corner and stopped; that the view of the street was unobstructed and that he was able to see the automobile coming without trouble.

Plaintiff was taken to the Belmont Hospital, where she was treated by Dr. Paul Kaufman. When he first examined her, she was in bed in a semi-conscious state. Blood was running all over her nose, left eye and lip. Her nose and lip were swollen and injured into the veins. On the following day blood was still coming from the eye, nose and lip. The torn skin above the eye was removed, the lip was sewed and the eye and lip were bandaged. Both eye bandages were brought together. There were 15 to 18 sutures put over the eye and 5 to 6 sutures in the lip. Plaintiff complains of dizziness, headaches and bad hearing in her left ear. Some of her teeth were

loosened in the accident. She remained in the hospital and in bed for 11 or 12 days, where she received treatment to her head, back and left leg. At the hospital she was strapped for traumatic pleurisy, and the straps were kept on about 10 days. The doctor found that she had sustained a cerebral concussion with rupture of a cerebral blood vessel, traumatic pleurisy, sprain of the sacro-illiac joint, secondary anemia and marked contusion or laceration of the left leg. After she was removed to her home the physician treated her there for about 6 weeks, giving her infra-red treatments for the chest, back, lower spine and head. For pain and sleeplessness she was given sedatives, and liver extract and tablets for anemia and the loss of blood. After being treated at her home for six weeks, she went to the doctor's office every week until the first of the following year and received treatments for the pains in her head and the anemia. She made about 80 visits to the doctor's office and was still under his care at the time of the trial. In May, 1941, Dr. Kaufman sent her to Dr. Sigmund Krumholz, a psychiatrist. She paid Dr. Kaufman \$100 on account of his bill of \$340. She received dental care of her teeth which had been loosened in the accident, and a new bridge was made to replace the one that had been broken. She was also treated in April, 1940, by a Dr. Abelio, whom she saw 3 or 4 times. She testified that she weighed 123 pounds before the accident, and that at the time of the trial she weighed 107 pounds; that she cannot see as well as before the occurrence; that before the accident she wore glasses only when she read, and that subsequent to the accident she was fitted for other glasses. She testified that she has scars on her face about the left eye and lower lip and on her left leg. She suffers from headaches and dizziness about once every week and suffers from general weakness. Dr. Kaufman testified that in his opinion the condition from which she was suffering was permanent. Plaintiff maintains that the actual expense incurred

household in the accident. The accident in the hospital and in bed for  
11 or 12 days, when she received treatment to her head, back and left  
leg. At the hospital she was diagnosed for traumatic arthritis, and the  
strains were kept on about 10 days. The doctor found that she had  
sustained a cerebral concussion with rupture of a cerebral blood vessel,  
traumatic arthritis, sprain of the sacro-lumbar joint, secondary anemia  
and marked contusion or laceration of the left leg. After she was  
removed to her home the physician treated her there for about 3 weeks,  
giving her intra-venous treatments for the chest, back, lower spine and  
head. For pain and sleeplessness she was given sedatives, and liver  
extract and radium for anemia and the loss of blood. After being  
treated at her home for six weeks, she went to the doctor's office  
every week until the first of the following year and received treatment  
for the pains in her head and the anemia. She made about 20 visits to  
the doctor's office and was still under his care at the time of the  
trial. In May, 1941, Dr. Kaufman came out to Dr. Kaufman's hospital,  
a psychiatrist. He said Dr. Kaufman 100 in account of his bill of  
\$340. She received dental care of her teeth which had been loosened  
in the accident, and a new bridge was made to replace the one that  
had been broken. She was also treated in April, 1940, by a Dr. Shapiro,  
whom she saw 2 or 3 times. She testified that she weighed 125 pounds  
before the accident, and that at the time of the trial she weighed 107  
pounds; that she cannot see as well as before the accident; that  
before the accident she wore glasses only when she read, and that  
subsequent to the accident she was fitted for other glasses. She  
testified that she has scars on her face about the left eye and lower  
lip and on her left leg. The sutures from headaches and dizziness  
about once every week and suffers from general weakness. Dr. Kaufman  
testified that in his opinion the condition from which she was suffering  
was permanent. He testified that the actual expenses incurred



by her amounted to \$1,091.30, made up of Dr. Kaufman's bill for \$340, the hospital bill of \$139, and the loss of \$612, which she would have earned during 17-1/2 weeks at an average of \$35 a week.

Plaintiff urges that the amount of the verdict is grossly and wholly inadequate and manifestly against the weight of the evidence relative to the actual damages and losses and the physical injuries sustained by the plaintiff, and that it is obvious that the jury disregarded competent and credible testimony, ignored the court's instructions, and failed to take into consideration proper elements of damages clearly proven. In reply to this contention defendant asserts that the verdict was not inadequate; that plaintiff was guilty of contributory negligence which was the proximate cause of the accident, and that as she is not entitled to recover at all, she cannot complain that the verdict in her favor is inadequate. Defendant maintains that there was a serious conflict in the evidence as to what plaintiff was suffering from, and as to whether she suffered any damage of consequence, and calls attention to the cross-examination of Dr. Kaufman, who testified that his diagnosis of secondary anemia was based on the excessive loss of blood from the areas that were bleeding. He did not recall using the hemoglobin or blood count when he made his diagnosis. When cross-examined from the hospital record, which indicated that her blood count was 90%, he conceded that this was better than normal. Other claimed ailments were traumatic pleurisy and sacroiliac sprain. Dr. Kaufman conceded that X-ray was a means of determining whether there was pneumonia or pleurisy. He did not claim to have any X-ray evidence to substantiate his claim of pleurisy, and Dr. Hansen, defendant's witness, testified that plaintiff's exhibits 2 and 4 were negative of any evidence of pathology and concurred in the statement of Dr. Kaufman that pleurisy could be seen in an X-ray film if it were in fact present. Dr. Kaufman further admitted that if there was a sprain of the sacroiliac joint, it would appear in the X-ray of the patient. He did not remember whether it

by her account to 1,001.50, which is of Dr. Kaufman's bill for \$40,  
the hospital bill of 115, and the loan of 612, which she would have  
obtained during 17-18 weeks at an average of 35 a week.

Plaintiff argues that the amount of the verdict is grossly  
and wholly inadequate and manifestly against the weight of the  
evidence relative to the actual injuries and losses and the physical  
injuries sustained by the plaintiff, and that it is obvious that the  
jury disregarded competent and credible testimony, ignored the court's  
instructions, and failed to take into consideration proper elements  
of damages clearly proven. In reply to this contention defendant  
asserts that the verdict was not inadequate; that plaintiff was guilty  
of contributory negligence which was the proximate cause of the acci-  
dent, and that as she is not entitled to recover at all, she cannot  
contend that the verdict in her favor is inadequate. Defendant  
maintains that there is no serious conflict in the evidence as to  
what plaintiff was suffering from, and as to whether she suffered any  
degree of concussion, and calls attention to the cross-examination  
of Dr. Kaufman, who testified that his diagnosis of secondary anemia  
was based on the excessive loss of blood from the areas that were  
bleeding. He did not recall using the hemoglobin or blood count when  
he made his diagnosis. When cross-examined from the hospital record,  
which indicated that her blood count was 50, he conceded that this  
was better than normal. Other clinical ailments were traumatic anemia  
and scurvy. Dr. Kaufman conceded that X-ray was a means  
of determining whether there was pneumonia or pleurisy. He did not  
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exhibits 3 and 4 were negative of any evidence of pathology and  
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in an X-ray film if it were in fact present. Dr. Kaufman further  
admitted that if there was a sprain of the scapulothoracic joint, it would  
appear in the X-ray of the patient. He did not remember whether it



appeared in the X-ray. As far as he knew, it did not. Dr. Hansen testified positively that it did not appear. It was also claimed that plaintiff was suffering from tachycardia, which was defined by Dr. Kaufman as an acceleration of the heart, or a rapid heart. On cross-examination, he testified that she suffered from shock, caused by loss of blood. He stated that one of the symptoms of shock is slow pulse. Defendant argues that this testimony is contradictory in that it shows the patient as having a slow pulse and a rapid heart beat at the same time. Defendant also points out that Dr. Kaufman testified that plaintiff's blood pressure was 90 over 60 diastolic, which he said was a normal ratio, and that when confronted by the record of the interne that the blood pressure was 128 over 82 on the same day that she came in, said that this was normal. Plaintiff testified that she worked at Huben's store for 3 years before the accident, selling dresses, coats and other articles of apparel and that she worked steadily in the year prior to the accident. It developed later, however, that for 8½ months she had been in California, with the exception of 2 or 3 weeks she had worked before the accident. She testified on direct examination that her average weekly earnings were approximately \$40 a week. On cross-examination, she admitted that she made \$22 a week, and that at no time, even during the weeks around Christmas, the best in the year in that business, did she make \$40 a week. The contention of defendant as to her earnings is supported by the earning record of her employer. Defendant argues that the jury had the right to conclude, and rightfully concluded, that the injuries suffered were of a minor character and that she attempted to build up her injuries and damages far beyond their real stature, and that because of this the verdict should not be disturbed.

At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions in tort were in-



operated in the way. he let us be known, in this way. Dr. Johnson testified positively that it was not known. It was also known that of itself was suffering from hemorrhoids, which was defined by Dr. Johnson as an enlargement of the heart, or a small heart. In other words, he testified that she suffered from these, caused by loss of blood. He stated that one of the symptoms of blood is also pale. Defendant argues that this testimony is contradictory in that it shows the patient as having a slow pulse and a weak heart beat at the same time. Defendant also points out that Dr. Johnson testified that Plaintiff's blood pressure was 80 over 50 diastolic, which he said was a normal ratio, and that when confronted by the record of the fact that the blood pressure was 110 over 80 on the same day that she came in, said that this was normal. Plaintiff testified that she worked at when's place for 3 years before the accident, selling dresses, coats and other articles of apparel and that she worked steadily in the year prior to the accident. It developed later, however, that for 6 months she had been in California, with the exception of 3 or 4 weeks she had worked before the accident. She testified on direct examination that her average weekly earnings were approximately \$40 a week. On cross-examination, she testified that she made \$15 a week, and that at no time, even during the winter months, the best in the year in that business, did she make \$40 a week. The contention of defendant as to her earnings is supported by the verbal record of her earnings. Defendant argues that the jury had the right to conclude, and rightly concluded, that the injuries suffered were of a minor character and that she attempted to build up her injuries and damages far beyond their real extent, and that because of this the verdict should not be allowed. It is common law that new trials were not allowed upon the ground that the damages allowed by the jury in actions in tort were too

sufficient. The rule in Illinois is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. (Montgomery v. Simon, 309 Ill. App. 516.) Before the jury could award any damages to plaintiff, they first had to determine that defendant was guilty of the negligence charged, that such negligence was the proximate cause of the injuries suffered, and that she was in the exercise of ordinary care for her own safety at and about the time of the occurrence. The fact that the jury found the defendant guilty and awarded damages in the sum of \$300 normally would indicate that they found in her favor on the question of liability, and that they disbelieved the testimony introduced in her behalf as to her injuries. A careful perusal of the transcript convinces us that despite the effort to exaggerate plaintiff's personal injuries and loss of salary, she did suffer substantial injuries and loss of salary, and the damages of \$300 awarded to her is wholly inadequate and manifestly against the weight of the evidence. Nevertheless, we agree with the contention of the defendant that the verdict should not be set aside, and that the evidence clearly shows that plaintiff was guilty of contributory negligence which proximately caused the accident. ✓ Her testimony is that she was walking south on the crosswalk when she was struck by defendant's automobile. She admits that she did not see the automobile until the impact occurred. Defendant testified that she walked into the left door of his automobile. Her testimony corroborates the testimony of defendant in this respect. A witness introduced by plaintiff, Joseph Towelski, testified that he saw the defendant pass the street car at Diversey Avenue, a block away, that the view of the street was unobstructed, and that he was able to see the automobile coming without any trouble. The evidence clearly shows that the proximate cause of the accident was the fact that plaintiff walked into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door, and that she was not

...the rule in Illinois is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. (Wright v. Union, 300 Ill. App. 518.) Before the jury could award any damages to Plaintiff, they first had to determine that defendant was guilty of the negligence charged, that such negligence was the proximate cause of the injuries suffered, and that she was in the exercise of ordinary care for her own safety at and about the time of the occurrence. The fact that the jury found the defendant guilty and awarded damages in the sum of \$200 necessarily would indicate that they found in her favor on the question of liability, and that they disbelieved the testimony introduced in her behalf as to her injuries. A careful perusal of the transcript convinces us that this is the effort to exaggerate Plaintiff's personal injuries and loss of salary, and the damages of \$200 awarded to her is wholly inadequate and manifestly against the weight of the evidence. Nevertheless we agree with the conclusion of the defendant that the verdict should not be set aside, and that the evidence clearly shows that Plaintiff was guilty of contributory negligence which proximately caused the accident. Her testimony is that she was walking south on the crosswalk when she was struck by defendant's automobile. She admits that she did not see the automobile until the impact occurred. Defendant testified that she walked into the left door of his automobile. Her testimony corroborates the testimony of defendant in this respect. Witness introduced by Plaintiff, James Dowdell, testified that he saw the defendant pass the street car at Diversey Avenue, a block away, that the view of the street was unobstructed, and that he was able to see the automobile coming without any trouble. The evidence clearly shows that the proximate cause of the accident was the fact that Plaintiff walked into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door, and that she was not



in the exercise of due care for her own safety. A similar situation arose in the case of Isley v. McGlandish, 299 Ill. App. 564, where an appeal was taken by the plaintiff from a judgment of \$300 in her favor for the death of a seven year old child. Plaintiff complained of the inadequacy of the damages. The court in affirming the judgment, quoted with approval from O'Malley v. Chicago City Railway Company, 33 Ill. App. 354, 355:

"It may be conceded that the action of the jury was inconsistent, but the concession would furnish no consistent reason for inconsistency in the action of the court. \* \* \* A plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant set aside. \* \* \*"; nor one in his or her own favor, because the damages awarded are less than the pecuniary injury."

In overruling the motion for a new trial in the instant case, the trial judge remarked: "Now, in some of the earlier cases where they have questioned the allowance for a new trial on the inadequacy of the damages, and held where it was not improper to deny the new trial on the question of liability, Judge Gary very aptly said, as far back as 31 [33] Appellate, that if the verdict is inconsistent because of the inadequacy of the damages it would not be wise to add another inconsistency to grant a new trial where the plaintiff was exceedingly fortunate in getting any amount of damage. I think, in view of these facts, I will deny the motion for a new trial". The evidence does not show that the defendant is liable. However, he is not asking for any relief from the judgment, and we are of the opinion that substantial justice will be accomplished by allowing the judgment to stand.

Plaintiff also argues that the court erred in sustaining objections to hypothetical questions propounded to her medical witnesses, and that the jury was influenced by passion and prejudice in their deliberations and in arriving at their verdict. Having found that the evidence shows that the proximate cause of the injuries suffered was plaintiff's own negligence, it is unnecessary for us

in the case of the case for her own safety. In the case of Leary v. Hollenback, 200 Ill. 404, 405, where an appeal was taken by the plaintiff from a judgment of \$100 in damages for the death of a seven year old child. Plaintiff complained of the inadequacy of the damages. The court in affirming the judgment, stated with approval from Leary v. Hollenback 200 Ill. 404, 405:

"It may be conceded that the action of the jury was harsh-almost, but the consideration would furnish no substantial reason for inconsistency in the action of the court. Plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant set aside. The court in its own favor, awards the damages awarded and does not award any injury."

In affirming the action for a new trial in the instant case, the trial judge remarked: "Now, in some of the cases where courts have questioned the allowance for a new trial on the inadequacy of the damages, and held that it was not improper to deny the new trial on the question of liability, judges have said that, as far back as 11 [12] years ago, that if the verdict is inadequate because of the inadequacy of the damages it would not be wise to set another inconsistency to grant a new trial where the plaintiff was reasonably fortunate in getting any amount of damages. I think, in view of these facts, I will deny the action for a new trial." The witnesses here not show that the defendant is liable. However, he is not liable for any relief from the judgment, and he is of the opinion that substantial justice will be accomplished by affirming the judgment as made.

Plaintiff also argues that the court acted in error in objection to hypothetical questions propounded to the medical witnesses, and that the jury was influenced by said questions and in their deliberations and in arriving at their verdict. Having found that the evidence shows that the proximate cause of the injuries suffered was plaintiff's own negligence, it is unnecessary for me

to discuss these points. Plaintiff also complains of the action of the court in striking that part of her complaint which charged the defendant with wilful and wanton conduct. We agree with the defendant that there was no evidence tending to support the charge of wilful and wanton conduct, and the court properly struck that part of her complaint.

Because of the views expressed, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.



to discuss these points. The court also considered the motion of  
 the court in ruling that part of the evidence which charged the  
 defendant with willful and wanton conduct. It agrees with the  
 defendant that there was no evidence tending to support the charge  
 of willful and wanton conduct, and the court hereby strikes that  
 part of the evidence.

Because of the above evidence, the judgment of the superior  
 court of Cook County is affirmed.

JUDICIAL NOTICE.

WILLIAM A. LEE, J., CLERK.

41917

WALLACE J. GOODRICH, administrator of  
the Estate of FRANCES GOODRICH, Deceased,

Appellant,

v.

A. A. SPRAGUE, Receiver for the Chicago,  
North Shore & Milwaukee Railroad Company,  
a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY,

Modified Opinion

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT ON  
REHEARING:

314 I.A. 671<sup>3</sup>

The petitioner, Wallace J. Goodrich, administrator of the Estate of Frances Goodrich, deceased, plaintiff below, by his Amended and Supplemental Petition for leave to Appeal (which was allowed and to which defendant-appellee filed an answer) prays this court to grant leave to appeal from the order of the Circuit Court of Cook County entered June 20, 1941, granting a new trial in this cause. Petitioner represents that on July 23, 1937, plaintiff's decedent was killed by a train operated by defendant; that on January 7, 1938, petitioner filed his complaint in the Circuit Court of Cook County against defendant-appellee; that the cause came on for jury trial and on March 7, 1939, the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$5,000. The defendant thereafter filed a motion for judgment notwithstanding the verdict, or for a new trial, and on June 23, 1939, the trial judge entered judgment for defendant notwithstanding the verdict, but did not rule upon the motion for new trial.

Upon a former appeal to this court, the defendant presented certain grounds for new trial. This court held, pursuant to section 68 (3)c of the Civil Practice Act, that no error appeared in the grounds urged for new trial which would entitle the defendant to a new trial, and in accordance with this holding entered judgment upon the jury's verdict. (Goodrich v. Sprague, 304 Ill. App. 1556). The

THE ESTATE OF FRANK GOEDRICH, deceased,  
Plaintiff,

vs.

J. A. HANCOCK, Receiver for the Chicago  
North Shore & Milwaukee Railroad Company,  
Defendant.

Motion for Judgment

MR. JUSTICE HANCOCK, DELIVERED THE VERDICT OF THE COURT OF

REMARKS:

3141A.671

The petitioner, Miss J. Goodrich, administrator of the  
Estate of Frank Goodrich, deceased, plaintiff below, by his attorneys  
and supplemental petition for leave to amend (which was allowed  
and to which defendant-complee filed an answer) prays this court  
to grant leave to appeal from the order of the district court of Cook  
County entered June 30, 1931, granting a new trial in this cause.  
Petitioner represents that on July 27, 1927, plaintiff's deceased  
was killed by a train operated by defendant; that on January 7, 1928,  
petitioner filed his complaint in the district court of Cook County  
against defendant-complee; that the cause came on for jury trial  
and on March 7, 1928, the jury returned a verdict finding the defendant  
guilty and assessing plaintiff's damages at \$5,000. The defendant  
thereafter filed a motion for judgment notwithstanding the verdict,  
or for a new trial, and on June 25, 1928, the trial judge entered  
judgment for defendant notwithstanding the verdict, but did not rule  
upon the motion for new trial.

When a former appeal to this court, the defendant presented  
certain grounds for new trial. This court held, pursuant to section  
66 (3) of the Civil Practice Act, that no error appeared in the  
grounds urged for new trial which would entitle the defendant to a  
new trial, and in accordance with said holding entered judgment upon  
the jury's verdict. (Goodrich v. Chicago North Shore & Milwaukee, 1930 Ill. App. 1230). The



defendant thereafter sued out a writ of error in the Supreme Court of Illinois, contending inter alia, that section 68 (3)c was unconstitutional in so far as it authorized the Appellate Court to pass upon grounds for new trial which had not been ruled upon by the trial court. The Supreme Court held that such action was not within the appellate jurisdiction of the Appellate Court and that the case must be remanded to the trial court to pass upon the motion for new trial. The Supreme Court affirmed the decision of the Appellate Court in reversing the judgment notwithstanding the verdict and held that the case was properly submitted to the jury. (Goodrich v. Sprague, 376 Ill. 80).

Upon reinstatement and redocketing in the Circuit Court, the motion for new trial was considered on June 20, 1941 by the trial Judge, who granted the motion for new trial.

From the facts and testimony concerning this accident, it appears that the deceased was killed by a train operated by the defendant in the Village of Glenwood, where Woodlawn Avenue crosses at grade the tracks of both the North Shore Electric Railroad and the Chicago and Northwestern steam railroad. Both sets of tracks at this point are parallel and run nearly north and south; Woodlawn Avenue runs nearly east and west, intersecting the railroad tracks at an angle. The double tracks of the two railroads run parallel to each other from Harbor Street, which is about 1228 feet north of Woodlawn Avenue, to a point 878 feet south of Woodlawn Avenue, where the Northwestern tracks continue south, and the North Shore tracks curve to the east. At the Woodlawn Avenue crossing the distance between the two sets of tracks is 53 feet. The tracks of the Northwestern lie to the west and are on a higher elevation than the North Shore tracks, the difference in elevation being 3 feet 6 $\frac{1}{2}$  inches. On the north side of Woodlawn Avenue are the North Shore passenger station platforms, which stations the local North Shore trains use, but which is not used by the express and special trains. The station

defendant in this case was a white male, in the middle of his  
thirties, approximately 5'10" tall, 175 lbs., dark hair, blue eyes, and a mustache.

Witness in an effort to identify the defendant as being  
guilty of the crime which had been committed by the trial court.

The witness testified that such action was not within the scope  
of the jurisdiction of the trial court and that the case must be returned

to the trial court to make such action for new trial. The witness  
testified that the decision of the trial court in returning the

judgment notwithstanding the verdict and that the case was  
properly submitted to the jury. (Exhibit A, 175 Ill. 2d).

Upon remandment and rehearing in the trial court,  
the motion for new trial was considered on June 10, 1911 by the trial

judge, who granted the motion for new trial.  
From the facts and testimony concerning this defendant, it

appears that the deceased was killed by a train operated by the  
defendant in the village of Chicago, where Cook County Avenue crosses

at grade the tracks of both the North and West Branch Rivers and the  
Chicago and Northwestern steam railroad. Both sets of tracks at

this point are parallel and run nearly north and south; Cook County  
Avenue runs nearly east and west, intersecting the railroad tracks at

an angle. The double tracks of the two railroads run parallel to  
each other from Madison Street, which is about 1500 feet north of

Cook County Avenue, to a point 275 feet south of Cook County Avenue, where  
the Northwestern crosses another street, and the North Branch River

crosses to the east. At this location Avenue crossing the distance  
between the two sets of tracks is 45 feet. The tracks of the North

Branch River are to the west and are on a higher elevation than the North  
Branch River, the difference in elevation being 3 feet 6 inches. On

the north side of Cook County Avenue are two North Branch River  
station platforms, which stations the local North Branch River use,

but which is not used by the express and special trains. The station



for Northwestern steam trains is at Hubbard Woods, south of Woodlawn Avenue.

The neighborhood east of the tracks is residential, with about four dwellings to the acre and one or two parks. One of these parks extends south from Woodlawn Avenue adjacent to the North Shore right of way, and is used as a playground for children. The right of way owned by the North Shore from Woodlawn Avenue to the south extends 52 feet east of the east rail. There are poles, brush, shrubbery and trees on this right of way extending all the way from Woodlawn Avenue to Scott Avenue, the line of poles being about seven feet east of the east rail and the line of trees about 10 or 12 feet further east, ranging from 17 to 20 feet east of the North Shore tracks. There is some conflict in the evidence as to how close the shrubbery and brush was to the east rail. Plaintiff's picture, Exhibit 3, taken on the day of the accident, and the testimony of plaintiff's witnesses, evidence that there was a heavy growth of shrubbery extending fully as far west as the line of poles, and also some bushes between the poles and the tracks, for the defendant, the motorman, Schmidt, testified that the brush and shrubbery were about twenty feet from the rail. Defendant's exhibits show less brush and shrubbery than plaintiff's evidence indicated, but these pictures were taken on July 28, 1937, five days after the accident and two witnesses testified that these photographs did not correctly portray the crossing as it was on July 23, 1937 because brush and shrubbery had been removed a few days after the event.

There are no gates at the crossing. The warning system consists of four signal posts. All four have flashing red lights and two have bells in addition. For convenience, these posts are herein designated respectively, A, B, C and D. Signal post A is located on the north side of Woodlawn Avenue, just east of the North Shore tracks, and is equipped with both a bell and a flasher. Signal post B is on the south side of Woodlawn Avenue, between the tracks of the two



The north-western corner of the lot is at the corner of  
Woodlawn Avenue.  
The railroad east of the track is parallel with  
about four feet to the east and one or two feet. One of these  
marks extends south from Woodlawn Avenue adjacent to the North  
right of way, and is used as a highway for children. The right  
of way owned by the North Street and South Avenue to the south  
extends 5 feet east of the east rail. Under the poles, brush,  
shrubbery and trees on this right of way extending all the way from  
Woodlawn Avenue to North Avenue, the line of poles being about seven  
feet east of the east rail and the line of trees about 10 ft. in front  
further east, ranging from 15 to 20 feet east of the North Street crossing.  
There is some conflict in the evidence as to how close the shrubbery  
and brush was to the east rail. Plaintiff's witness, Exhibit 1,  
taken on the day of the accident, and the testimony of Plaintiff's  
witnesses, advised that there was a heavy growth of shrubbery extend-  
ing fully as far west as the line of poles, and also some bushes  
between the poles and the tracks, for the defendant, the defendant,  
admitted, testified that the brush and shrubbery were about twenty  
feet from the rail. Defendant's Exhibit 2 shows how close the shrubbery  
then Plaintiff's witness indicated, but these pictures were taken  
on July 26, 1907, five days after the accident and two witnesses testi-  
fied that these photographs did not correctly portray the crossing  
as it was on July 21, 1907 because brush and shrubbery had been  
removed a few days after the event.  
There are no poles at the crossing. The crossing system  
consists of four signal posts. All four have flashing red lights and  
two have bells in addition. For convenience, these posts are herein  
designated respectively, A, B, C and D. Signal post A is located on  
the north side of Woodlawn Avenue, just east of the North Street crossing,  
and is surmounted with both a bell and a flasher. Signal post B is on  
the south side of Woodlawn Avenue, between the tracks of the two

railroads, but closer to the North Shore tracks. It has a flasher but no bell. Signal post C is on the north side of Woodlawn Avenue, between the two sets of tracks, but closer to the Northwestern tracks, and likewise has a flasher but no bell. Signal post D is located on the south side of Woodlawn Avenue, west of the Northwestern tracks, and like post A has both bell and flasher. Thus, the two outside posts have both bells and flashers, while the two inside posts have flashers only. These signals operate as follows. When trains are approaching the crossing on both lines, all four signals operate. If only a North Shore train is approaching, then only signal posts A, B and D operate; signal post C does not operate. If only a Northwestern train is approaching, then signals A, C and D operate and signal post B does not. That is, signal post A and D (the ones with the bells) operate whenever a train is approaching the crossing on either railroad; signal post B is actuated only by North Shore trains.

These signals are operated automatically, by means of electricity. When a train crosses a certain point in the rail, known as a cut-in point, the signals begin to function. The cut-in point for Northbound trains on the North Shore tracks is located 1160 feet south of the Woodlawn Avenue crossing; this point is south of the curve in the North Shore tracks. The cut-in point for northbound trains on the Northwestern tracks is 3072 feet south of the crossing which is south of the Hubbard Woods station.

This accident happened on July 23, 1937, at about 6:00 P. M. daylight saving time. It was a clear day; the sun was out but beginning to set. Decedent approached the crossing from the east, on the south sidewalk. She was going slowly, and gradually slowed down her bicycle until she came to a stop with one foot on the pedal of her bicycle and the other on the ground. The front wheel of her bicycle was either just touching the rail or just short of it. The bells at the crossing were ringing as she approached prior to the impact, due in part at least to the presence of a Northwestern steam train, headed north standing at the Hubbard Woods station. Just



...but closer to the North Shore tracks. It has a flasher and  
no bell. Signal post D is on the north side of Woodlawn Avenue,  
between the two sets of tracks, but closer to the Northshore tracks,  
and likewise has a flasher but no bell. Signal post E is located on  
the south side of Woodlawn Avenue, west of the Northshore tracks,  
and like post A has both bell and flasher. Thus, the two outside  
posts have both bells and flashers, while the two inside posts have  
flashers only. These signals operate as follows. When trains are  
approaching the crossing on both lines, all four signals operate. If  
only a North Shore train is approaching, then only signal posts A, B  
and D operate; signal post E does not operate. If only a Northshore  
train is approaching, then signals A, C and E operate and signal post  
B does not. That is, signal post A and C (the ones with the bells)  
operate whenever a train is approaching the crossing on either railroad;  
signal post B is actuated only by North Shore trains.  
These signals are operated automatically, by means of  
electricity. When a train crosses a certain point in the rail, known  
as a cut-in point, the signals begin to function. The cut-in point  
for Northshore tracks on the North Shore tracks is located 1150 feet  
south of the collision avenue crossing; this point is south of the  
curve in the North Shore tracks. The cut-in point for Northshore  
trains on the Northshore tracks is 500 feet south of the crossing,  
which is south of the Abbott Road station.  
This accident happened on July 22, 1937, at about 8:00 P. M.  
A bright sunny day. It was a clear day; the sun was out but  
beginning to set. Accident approached the crossing from the east,  
on the south side. The car came slowly, and gradually slowed  
down her bicycle until she came to a stop with one foot on the pedal  
of her bicycle and the other on the ground. The front wheel of her  
bicycle was either just touching the rail or just short of it. The  
bells of the crossing were ringing as she approached prior to the  
impact, but in fact at least to the attention of a Northshore train  
train, headed north standing at the Abbott Road station. Just



before the train hit decedent she made an unsuccessful attempt to move back, but it was too late.

There is a conflict in the evidence as to how long decedent was at the track before she was hit; whether or not the train whistle was blown; how fast the train was going; and how far the train traveled after the brakes were applied. Witnesses Sullivan and Mrs. Turner, eye witnesses to the occurrence, testified that decedent was in a stationary position for fifteen to thirty seconds before she was hit. Curby, another eye witness, corroborated this; he further testified that he saw the girl waiting there, and after the train rounded the curve at Scott Avenue he arose from his seat, moved to the edge of the platform and waved his hand up and down four or five times as a signal to the motorman to blow his whistle. The motorman, Schmidt, testified that he did not see decedent until he was about 150 feet from the crossing at which time she emerged from behind a tree; she kept coming and stopped near the rail and was only there a very few seconds before he hit her. The witness Sullivan testified that no whistle was blown until just about the moment of impact and Curby said he heard no whistle at all before the crash. Motorman, Schmidt, testified that he blew four or five short blasts on the whistle as soon as he saw decedent at which time he was 150 feet from the crossing. The testimony of other members of the train crew (who were on duty in the coaches) tended to corroborate Schmidt's testimony as to the distance of the train from the crossing when the whistle was blown, but they heard only one blast of the whistle.

There was evidence that the speed of the train was about 40 or 45 miles per hour, and the witness, Tanney, testified that it was possible that the train was going 45 to 50 miles per hour but that he doubted it. There is a conflict in the evidence as to how far the train traveled after the accident. Witness Sullivan testified that there were five cars in the train and that it ran  $2\frac{1}{2}$  to 3 times its length after the accident. Curby agreed that it was a four or five

before the train hit defendant the same an unobstructed straight to  
have been, but it was not.

There is a conflict in the evidence as to how fast defendant

was at the track before the accident; whether or not the train  
whistle was blown; how fast the train was going; and how far the  
train traveled after the brakes were applied. Witness Sullivan  
and Mr. Turner, eye witnesses to the accident, testified that  
defendant was in a stationary position for fifteen to thirty seconds  
before the accident. Mr. Turner, another eye witness, corroborated this;  
he further testified that he saw the girl waiting there, and after  
the train rounded the curve at North Avenue he saw her hit and

reared to the edge of the platform and waved his hand up and down  
four or five times as a signal to the motorist to blow his whistle.  
The motorist, however, testified that he did not see defendant until  
he was about 150 feet from the crossing at which time the car emerged from  
behind a tree; the car moved and stopped near the rail and was only  
there a very few seconds before he hit her. The witness Sullivan  
testified that no whistle was blown until just about the moment of  
impact and that he heard no whistle at all before the crash.

Witness, however, testified that he blew four or five short blasts on  
the whistle as soon as he saw defendant at which time he was 150 feet  
from the crossing. The testimony of other members of the train crew  
(who were on duty in the coaches) tended to corroborate witness's  
testimony as to the distance of the car from the crossing when the  
whistle was blown, but they heard only one blast of the whistle.

There was evidence that the speed of the train was about 40  
or 45 miles per hour, and the witness, Turner, testified that it was  
possible that the train was going 45 to 50 miles per hour but that he  
doubted it. There is a conflict in the evidence as to how far the  
train traveled after the accident. Witness Sullivan testified that  
there were five cars in the train and that it was 25 to 30 times the  
length of the accident. Turner testified that it was a length five



car train. The length of a car is about 60 feet. The members of the train crew testified that the train was composed of three cars and that it traveled about 500 feet from the point where the brakes were applied to the point where the train came to a stop.

Mrs. Goodrich, mother of decedent, and a school teacher, both testified regarding decedent's age, experience, intelligence and capacity. At her death, she was 11 years and 3 months old, and was about four feet eleven inches tall; her hearing and sight were normal; she was a good student, alert and interested in everything, and was a little above the average in intelligence and capacity; she took part in plays, singing, swimming, art and dancing. She had been riding a bicycle since she was seven years of age, but it had been only a few months since she had gone any distance from her home, which was in Winnetka, about one block west of the tracks. Decedent had some friends who lived east of the tracks some blocks to the south of Woodlawn Avenue, and visited them occasionally, but most of the time she was taken there by her mother or by the mothers of her friends. She had been allowed to cross the tracks by herself for only a year. Mrs. Goodrich testified that to her knowledge the only crossing her daughter had crossed on a bicycle was El Dorado Avenue in Winnetka, which crosses the tracks of both railroads, and that the El Dorado Avenue crossing is protected by gates.

The motion for new trial alleges in general terms that the trial court erred in excluding proper evidence offered by defendant and in admitting improper evidence offered by plaintiff.

The Supreme court, in passing upon the questions involved in Goodrich v. Saragusa, 376 Ill. 60, said:

"Viewed in the light of the rule that if evidence supporting plaintiff's claim appears in the record the cause should be submitted to a jury, we are of the opinion that such evidence exists in this record, and unless it can be said that deceased was guilty of contributory negligence, as a matter of law, which we do not think can be said on this record, the issues of negligence and contributory negligence are questions that were properly submitted to the jury."

Further, the court there said in its opinion;



one train. The length of a car is about 30 feet. The members of the train crew testified that the train was composed of three cars and that it traveled about 300 feet from the point where the tracks were applied to the point where the train came to a stop.

Mr. Goodrich, member of the jury, and a special investigator, both testified regarding Goodrich's age, experience, intelligence and capacity. At her death, she was 11 years and 5 months old, and was about four feet eleven inches tall; her hearing and sight were normal; she was a good student, alert and interested in everything, and was a little above the average in intelligence and capacity; she took part in plays, singing, swimming, art and dancing. She had been riding a bicycle since she was seven years of age, but it had been only a few months since she had gone any distance from her home, which was in Lincoln, about one block west of the tracks. Goodrich had some friends who lived east of the tracks very close to the south of Goodrich Avenue, and visited them occasionally, but most of the time she was taken there by her mother or by the mother of her friends. She had been allowed to cross the tracks by herself for only a year. Mrs. Goodrich testified that to her knowledge the only crossing her daughter had crossed on a bicycle was at Goodrich Avenue in Lincoln, which crosses the tracks of both railroad, and that the 11 Goodrich Avenue crossing is watched by gates.

The motion for new trial alleges in general terms that the trial court erred in excluding proper evidence offered by defendant and in admitting improper evidence offered by plaintiff. The supreme court, in passing upon the questions involved

In Goodrich v. State, 78 Ill. 50, 1885.

It was in the light of the rule that if evidence submitted by a party is excluded in the second trial the same should be admitted to a jury, we are of the opinion that such evidence should be admitted, and unless it can be said that defendant was guilty of negligent homicide, as a matter of law, which we do not think can be said on this record, the issues of negligence and contributory negligence are questions that were properly submitted to the jury.

Further, the court there said in its opinion:

"Photographs were introduced in evidence showing the condition of the right of way of the 'North-Shore' electric lines. There is evidence in the record that trees and shrubs grew to within 10 or 15 feet of the east side of the east track, immediately south of Woodlawn Avenue. Its right-of-way there extended 50 feet east of the east track. The statute required that it clear its right-of-way of trees and shrubs for a distance of 500 feet on either side of a crossing. This means all the width of its right-of-way. That was not done in this case."

Upon this question, defendant's counsel made the statement that "the east right-of-way line of the Chicago North Shore & Milwaukee Railroad Company, south of Woodlawn Avenue is 52 feet east of the east rail of the northbound tracks. This plat shows a line of trees 20 feet east of the east rail of the north bound tracks of the Chicago, North Shore & Milwaukee Railroad Company, as shown on this plat". It clearly appears that brush, shrubbery and trees grew on defendant's right-of-way south of Woodlawn Avenue. Mr. Young, Village Manager of Glencoe, testified that a line of poles stretched along the right-of-way at about 7 feet from the east rail of the North Shore tracks and that the line of trees was 10 or 12 feet farther east than the poles. These trees were poplars or cottonwoods with low hanging branches, and the underbrush extended as far west at the line of trees, if not a little farther. Other witnesses testified that the bushes and shrubbery extended right up to the telephone poles, and that there were bushes between the poles and the tracks.

The purpose of the statute requiring that rights-of-way be cleared near crossings seems clearly to have been to (1) enable the motorman to see people at or near the tracks, and (2) afford to people approaching the crossing an unobstructed view of the tracks and crossing. The Supreme Court, *Goodrich v. Sprague*, (*supra*), further said;

"There is evidence that one approaching the crossing from the east on the south side of Woodlawn Avenue, as did the deceased, would have to come within a comparatively few feet of the northbound track before having a clear view for any considerable distance down the track."

There is also the testimony given by the motorman that he "didn't see her until she came out from behind a tree there. That tree



"Witnesses were introduced in evidence showing the possibility of one of the 'back-of-the-house' electric lines. There is evidence in the record that there are electric lines to within 10 or 15 feet of the east side of the east track, immediately south of Collins Avenue. Its right-of-way there extended 50 feet east of the east track. The witness testified that it is the right-of-way of trees and shrubs for a distance of 100 feet on either side of a crossing. This means all the width of the right-of-way. That was not done in this case."

Upon this question, defendant's counsel made the statement that the east right-of-way line of the Chicago North Shore & Milwaukee Railroad Company, south of Collins Avenue is 50 feet east of the east rail of the northbound tracks. This line above a line of trees 50 feet east of the east rail of the north bound tracks of the Chicago North Shore & Milwaukee Railroad Company, as shown on this map. It clearly appears that branch, shrubbery and trees from defendant's right-of-way south of Collins Avenue. Mr. Young, Village Manager of Chicago, testified that a line of poles stretched along the right-of-way at about 7 feet from the east rail of the North Shore tracks and that the line of trees was 10 or 15 feet farther east than the poles. These trees were located on cottonwoods with low hanging branches, and the underbrush extended as far west of the line of trees as not a little farther. Other witnesses testified that the bushes and shrubbery extended right up to the telephone poles, and that there were bushes between the poles and the tracks.

The purpose of the witness testimony that right-of-way be clear near crossings seems clearly to have been to (1) enable the motorist to see people at or near the tracks, and (2) allow the people approaching the crossing an unobstructed view of the tracks and crossing. The witness testified, Joseph V. Spencer, (more), further said:

"There is evidence that one approaching the crossing from the east on the south side of Collins Avenue, as all the witnesses would have to come within a comparatively few feet of the northbound track before having a clear view for any considerable distance down the track."

There is also the testimony given by the witness that the witness saw her until she came out from behind a tree there. That tree



stands about fifteen or twenty feet from the east rail of the north-bound track. I first saw her when she came from behind that tree. The moment I saw her I jumped up and took my hand off the power and threw the train in emergency . . . . I could have done nothing else to stop the train . . . . A large tree prevented me from seeing the little girl before the time when she was 15 feet from the rail . . . . I saw her just as she emerged from behind that tree. What prevented me from seeing her before she got to that tree were the trees further back which obstructed the view. There are trees all along there obstructing the view". There were other witnesses who testified that decedent was in a stationary position, with her bicycle wheel very close the east rail, for a period of fifteen to thirty seconds. It appears also that the space of 53 feet between the two railroads gives ample space to stand in safety. The local passenger station for south bound trains is located in that space, and, since people can wait in safety between the two railroads, there is an inducement to a pedestrian or cyclist to regard each set of tracks as separate crossings, and it was natural for decedent to approach the track to see if a train was coming on the North Shore track. There is evidence that the signals were operating about the time when decedent approached the track. There was a Northwestern train standing at Hubbard Woods station, which caused the bells to ring, and which had been standing there for at least five minutes before decedent stopped at the crossing. Signal post B, which was in decedent's direct line of vision, did not start to flash until after she came to a stop. It appears from the evidence that decedent looked south toward the Northwestern train standing at the Hubbard Woods station, which logically enough was the reason for the ringing of the bells, and strengthened the conclusion reached from the non-operation of signal post B that no North Shore train was approaching. When the signal on post B finally did begin to flash, it escaped decedent's attention for the change it created in the surroundings was slight and hardly noticeable in

On the morning of the accident, the train was en route from the north station to the south station. The train was composed of a locomotive and several passenger cars. The train was traveling at a speed of approximately 40 miles per hour. The accident occurred at a crossing where the train's path crossed over the path of a streetcar. The streetcar was traveling in the same direction as the train. The accident resulted in the death of several people and the destruction of property. The cause of the accident was determined to be the failure of the train's engineer to stop the train at the crossing. The engineer was found to be negligent and was charged with manslaughter. The case was tried in court and the engineer was found guilty. The court sentenced the engineer to a term of imprisonment. The accident was a tragic event and a reminder of the importance of safety in transportation.



view of the Northwestern train and the continuous ringing of the bells. It would appear, as suggested, that because of defendant's violation of the statute it was impossible for decedent to look south down the North Shore tracks due to the curve of the tracks without placing herself in a position of danger. There was a heavy growth of shrubbery extending as far west as the line of telephone poles and there were some bushes between the poles and the track. The line of telephone poles was only 7 feet from the east rail, and, due to the over-hang of the car from the rail and the distance from the seat of the bicycle to the front wheel, six feet from the tracks was the minimum point of safety for decedent. There were no gates or barriers. The sidewalk crosses the tracks at grade, with smooth boards flush with the rails; a child would not be able to see where the tracks were, without putting herself within the danger zone. It appears from the facts detailed that defendant violated the statute and that decedent's view was obscured in such manner as could have caused her unwittingly to place herself in a position of danger in order to determine whether a train was coming.

Defendant contends, however, that since there were signals decedent was bound to heed them, and that if she did not do so, her death was not the proximate result of the violation of the statute. In this regard, even though the crossing was so laid out and the signal system so constructed that it was reasonably to be expected that decedent would approach the crossing to see if a train were coming, still, the legislative purpose in enacting the brush statute was to ensure to the public, using that crossing, the benefit of a clear view, in addition to any other warning devices which the railroad might erect. That defendant violated the statute is sustained by the facts in evidence, as well as being the fixed law in this case by the decision of the Supreme Court. (Goodrich v. Sprague, supra).

There is ample evidence in the record from disinterested witnesses from which the jury could find that decedent and her bicycle



view of the northeastern train and the defendant's position of the rails. It would appear, as suggested, that because of defendant's violation of the statute it was inadvisable for defendant to look southward from the north shore across and in the curve of the tracks without placing herself in a position of danger. There was a heavy growth of shrubbery extending as far west as the line of telephone poles and there were some bushes between the poles and the tracks. The line of telephone poles was only 7 feet from the east rail, and, due to the overhanging of the car from the rail and the distance from the east of the signal to the front wheel, six feet from the tracks was the minimum point of safety for defendant. There were no gates or barriers. The defendant crosses the tracks at grade, with wooden boards flush with the rails; a child would not be able to see where the tracks were, without getting herself within the danger zone. It appears from the facts detailed that defendant violated the statute and that defendant's view was obscured in such manner as could have caused her unwittingly to place herself in a position of danger in order to determine whether a train was coming.

Defendant contends, however, that since there were signals defendant was bound to heed them, and that if she did not do so, her death was not the proximate result of the violation of the statute. In this regard, even though the crossing was so laid out and the signal system so constructed that it was reasonably to be expected that defendant would approach the crossing to see if a train was coming, still, the legislative purpose in enacting the crash statute was to secure to the public, within that crossing, the benefit of a clear view, in addition to any other warning devices which the railroad might erect. That defendant violated the statute is established by the facts in evidence, as well as being the fixed law in this case by the decision of the supreme court. (Goodrich v. Brown, supra). There is ample evidence in the record from disinterested witnesses from which the jury could find that defendant and her child

were in a stationary position, near the east rail, for a period of 15 to 30 seconds before she was struck. It is contended that the failure of the motorman to see decedent standing at the crossing, or his neglect to warn her of her danger, if he did see her, was negligence. It does appear that the weight of the evidence supports plaintiff's position. There is a question as to when the motorman saw decedent. If he saw her as soon as he rounded the curve at Scott Avenue, he was negligent in not blowing his whistle in time to warn her. There is also some conflict as to when the whistle was actually blown. All of defendant's witnesses, it seems, conceded that no whistle was blown until the train was 150 feet from the crossing. Indeed, all the evidence shows negligent failure to blow the whistle in time to avoid the accident. If the motorman did not see decedent until he was almost upon her, it was because his view of the crossing was obstructed by the trees and shrubbery. These facts were before the jury and it was for the jury to say whether the motorman properly signaled. The fact is that the motorman failed to blow his whistle while decedent was stationary at the crossing for 15 to 30 seconds, and can be accounted for in three ways; first, he wasn't looking; second, he saw her, but still failed to warn her; third, he was prevented from seeing her by the trees and shrubbery which were admittedly on the right of way in violation of statute. It would appear from the facts that the greater weight of the evidence indicates that there was negligence in not giving the required warning.

The next thing we have to consider is the speed of the train at the time. The rate of speed at which a train may be operated depends on the peculiar facts of each individual case, and, whether or not a given rate of speed is negligent, is a question of fact for the jury, unless the court is of the opinion that as a matter of law, under the facts of the particular case, no reasonable jury could find the speed unreasonable. (Landen v. Chicago & G. T. Ry., 92 Ill. App. 216; Brundage v. Chicago, B. & Q. R. R., 245 Ill. App. 440).



There is a very important question, which the jury will, for a period of  
10 to 20 seconds before the accident. It is concerned with the  
failure of the defendant to see the plaintiff at the crossing, or  
his neglect to warn her of her danger, if he did not see her, was  
negligence. It does not appear that the weight of the evidence supports  
plaintiff's position. There is a question as to when the defendant  
was negligent. If he saw her as soon as he reached the curve at least  
before, he was negligent in not blowing his whistle in time to warn  
her. There is also some conflict as to when the whistle was actually  
blown. All of defendant's witnesses, it seems, conceded that he  
whistle was blown until the train was 100 feet from the crossing.  
Indeed, all the evidence shows defendant failed to blow the whistle  
in time to avoid the accident. If the defendant did not see defendant  
until he was almost upon her, it seems because his view of the crossing  
was obstructed by the trees and shrubbery. These facts were before  
the jury and it was for the jury to say whether the defendant properly  
signaled. The fact is that the defendant failed to blow his whistle  
while defendant was stationary at the crossing for 10 to 20 seconds,  
and can be accounted for in three ways; first, he wasn't looking;  
second, he saw her, but still failed to warn her; third, he was  
overlooked from seeing her by the trees and shrubbery which were  
situated in the right of way in violation of statute. It would appear  
from the facts that the greater weight of the evidence indicates that  
there was negligence in not giving the required warning.  
The next thing we have to consider is the speed of the train  
at the time. The rate of speed at which a train may be operated  
depends on the peculiar facts of each individual case, and, whether  
or not a train may be operated at a negligent rate is a question of fact for  
the jury, unless the statute is of the nature that is a matter of law.  
Under the facts of the particular case, no reasonable jury could  
find the speed unreasonable. (London v. Chicago & N.W., 22 Ill.  
App. 1st 101; Chicago v. Chicago & N.W., 226 Ill. App. 440).



It appears from the evidence that all witnesses who testified estimated the speed of the train to have been at least 40 miles per hour. Several witnesses, including defendant's trainmen, estimated the speed at 40 to 45 miles. While this speed may be safe at some crossings, the jury might properly have found that such speed was not reasonable in this case where children customarily played in a park adjacent to the right of way, where the view was obstructed, the warning signals confusing, and where no warning was given by blowing a whistle. Considering these facts, which are of course matters for the jury, and which, no doubt, were considered by it in reaching the verdict of guilty and assessing plaintiff's damages in the sum of Five Thousand dollars, we find no reason for disturbing the jury's verdict.

Likewise, the question whether a child of eleven years of age is guilty of contributory negligence is a question for the jury. The decisions in this state lay down the rule that whether a child between the ages of 7 and 14 is guilty of contributory negligence in a particular case, is an open question of fact and must be left to the jury. The jury's verdict on this question should stand. Aside from the foregoing rule, it is contended that there was ample evidence in the record to show that decedent exercised that degree of care which a child of her age, capacity, intelligence and experience would have exercised under the same or similar circumstances, and it is urged by plaintiff that on the evidence, it was for the jury alone to decide whether decedent was guilty of contributory negligence, citing Chicago & Alton R. R. v. Pearson, 164 Ill. 386, and Elgin, J. & E. Ry. v. Lawlor, 229 Ill. 621, and other cases.

The real question which we ought to consider in this matter is whether a new trial may be granted where the questions have been submitted to the jury to determine the weight of the evidence and credibility of the witnesses. As suggested in People v. Hanisch,

It appears from the evidence that all witnesses who testified to the speed of the train to have been at least 50 miles per hour. Several witnesses, including defendant's witnesses, testified the speed of the train to be 40 to 45 miles. While this speed may be one of some consequence, the jury might properly have found that such speed was not responsible in this case where child on defendant's train in a dark adjacent to the right of way, where the view was obstructed, the warning signals confused, and where no warning was given by blowing a whistle. Considering these facts, which are of course matters for the jury, and which, no doubt, were considered by it in reaching the verdict of guilty and assessing defendant's damages in the sum of five thousand dollars, we find no reason for disturbing the jury's verdict.

Likewise, the question whether a child is eleven years of age is a matter of fact, and the decision is a question for the jury. The decision in this case is not the rule that whether a child between the ages of 7 and 14 is a matter of fact, and the decision is in a particular case, is an open question of fact and must be left to the jury. The jury's verdict on this question should stand. While from the foregoing rule, it is contended that there are legal witnesses in the record to show that defendant exercised due care of care which a child of her age, capacity, intelligence and experience would have exercised under the same or similar circumstances, and it is urged by defendant that on the evidence, it was for the jury alone to decide whether defendant was guilty of contributory negligence, citing Chicago & Alton R. Co. v. Pearson, 184 Ill. 286, and Illinois v. Pearson, 184 Ill. 286, and other cases.

The real question which we ought to consider in this matter is whether a new trial may be granted where the questions have been submitted to the jury to determine the guilt of the defendant and credibility of the witnesses. As suggested in People v. Pearson,



361 Ill. 466, the jury's verdict may not be lightly set aside. The court there said;

"Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of the witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

See also Russell v. Richardson, 302 Ill. App. 589.

The defendant, however, cites Gavin v. Katar, 278 Ill. App. 308, on the question of whether or not there was an abuse of discretion on the part of the trial court in granting a new trial, where the court said;

"In passing upon the merits of the instant contention it must be borne in mind that this is an appeal from an order of the trial court granting a new trial. If judgment had been entered upon the verdict and the appellees were here claiming that the evidence did not warrant the verdict, the question of the preponderance of the evidence would not arise in this court and we would not be warranted in disturbing the verdict of the jury unless the verdict was clearly against the manifest weight of the evidence. But, under the new Practice Act . . . this appeal concerns the action of the trial court in granting a new trial. A trial court has more latitude than this court in passing upon the verdict of the jury. The allowance or refusal of a new trial upon the weight of the evidence is peculiarly within the discretion of the trial court and he is warranted in granting a new trial if a plaintiff has failed to sustain his claim by a preponderance of the evidence. In passing upon the question as to whether or not the trial court in such case was justified in granting a new trial, we must bear in mind that there are many things which a trial judge observes on a trial that do not appear from the printed record, - the appearance of a witness, his or her manner of testifying, and other circumstances that greatly aid the trial court in determining the credibility of a witness and the weight, if any, that should be attached to his or her testimony.

However, in considering this case, the allegations in the complaint of negligent acts on the part of the defendant must be considered, and also as to whether plaintiff has sustained any one or more of them. From the cases called to our attention the rule seems to be that a new trial should not be granted unless the verdict is manifestly against the weight of the evidence. We are of the opinion that the court erred in granting a new trial on the facts and issues here involved, and are of the opinion that plaintiff's





case was supported by a preponderance of the evidence. This conclusion we have carefully considered and under the facts and circumstances as detailed by the witnesses and exhibits offered, we conclude that there was such a preponderance of evidence for plaintiff's case which did not justify the trial court in granting a new trial.

Objection was made to the admission and exclusion of certain evidence. A section foreman employed by defendant was produced for the purpose of showing that no brush or shrubbery was cut at the scene of the accident before defendant's photographs were taken. He made certain reports of the work done by himself and his crew; he used these reports to refresh his recollection, and having refreshed his recollection testified in full as to the work done. The reports were then excluded. In regard to writings used to revive recollection, it is said in Wigmore on Evidence, 3rd Ed. vol. III, sec. 783, p. 118, "that the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." In Davis v. Michigan Central R. R. Co., 294 Ill. 355, it was said that; "The entries in the book kept by the car inspector who examined the draw-bars and couplers on the day of the accident were properly excluded from the jury. A witness for plaintiff in error was permitted to testify as to all the facts contained in the entries and was permitted to refresh his memory from the entries made by him in the book kept by him. There is no rule of evidence making such entries admissible where the making of them is in no way brought in issue. They were made after the accident and were self-serving declaration."

There is also a contention made by defendant that there was error in admitting in evidence plaintiff's exhibit 3. This photograph was admitted with the following instruction to the jury;

"Now I would like to comment that in that photograph there is a superimposed - well, that is in the photograph itself, the picture of a boy and a bicycle. It appears that the Tribune Reporter from the witness stand stated that a policeman indicated to him the position of the bicycle and the little girl at the time of the accident. Now,



...was supported by a preponderance of the evidence. This conclusion  
we have carefully considered and under the facts and circumstances  
as detailed by the witnesses and exhibits offered, we conclude that  
there was such a preponderance of evidence for defendant's case which  
did not justify the trial court in granting a new trial.

Objection was made to the admission and exclusion of  
certain evidence. A hearing between counsel for defendant was conducted  
for the purpose of showing that no fraud or subterfuge was out of the  
scene of the accident before defendant's photographs were taken. He  
made certain reports of the work done by himself and his crew; he said  
these reports to refresh his recollection, and having refreshed his  
recollection testified in full as to the work done. The reports  
were then excluded. In regard to writings used to refresh recollection,  
it is said in People v. ..., 100 Cal. 2d 111, 328 P.2d 111,  
"that the offering party has not the right to treat it as evidence, by  
relying on it as showing it or that it is the fact, it is well established."  
In People v. ..., 100 Cal. 2d 111, 328 P.2d 111, it was said that:

"The entries in the book kept by the defendant were examined and  
found to be true and correct on the day of the accident were properly admitted  
from the jury. A witness for plaintiff in error was permitted to testify  
as to all the facts contained in the entries and was permitted to  
refresh his memory from the entries made by him in the book kept by  
him. There is no rule of evidence making such entries inadmissible where  
the entries of them is in no way brought in issue. They were made  
after the accident and were self-serving declarations."

There is also a declaration made by defendant that there was  
error in admitting in evidence plaintiff's exhibit 1. This photograph  
was admitted with the following instruction to the jury:

"Now I would like to comment that in this photograph there  
is a superimposed - well, that is in the photograph itself, the picture  
of a boy and a dog. It appears that the picture is superimposed upon the  
evidence which stated that a collision occurred to him the position of  
the dog and the little girl at the time of the accident. Now,



the jury is to disregard entirely the position of the bicycle and the boy in the picture, because the position of the bicycle, as told to the Tribune Reporter by the policeman, is not evidence, the policeman not having been an eyewitness to the accident. Therefore, I am letting this photograph go into evidence with the admonition to the jury that they are to disregard entirely the position of the bicycle and also the persons shown in this photograph and it is admitted merely for the purpose of showing the physical surroundings."

This photograph was the only photograph showing the condition of the brush and shrubbery which was taken the same day as the occurrence, defendant's photographs having been taken five days later and there was evidence by disinterested witnesses that these pictures did not correctly show the condition of the brush and shrubbery at the time of the occurrence because it had been cut down in the intervening period. Defendant's own witness testified that on July 24th (the day after the occurrence) his crew were mowing grass along this stretch. The purpose of evidence being to get at the truth, all evidence and particularly photographic evidence which portrays the condition as it was at the moment of the occurrence, should be admitted unless there is some compelling reason in law or logic for keeping it out. There seems to have been other evidence of witnesses familiar with the right of way, who testified that the photograph correctly portrayed the conditions of the shrubbery at the time of the accident. From what appears in the record, the court did not err in admitting the photograph.

The defendant contends that there are certain errors in giving instructions requested by plaintiff and call attention to the following instruction;

"If you believe upon a preponderance of the evidence that on or about July 23, 1937, Frances Goodrich was struck and killed by a train of the defendant; and if you believe that the death of the said Frances Goodrich was proximately caused by the negligence of the defendant as charged in the complaint, then if you also find that Frances Goodrich was both before and at the time of the accident in the exercise of ordinary care for her own safety, you should find the defendant guilty."

Defendant seriously contends that the giving of similar instructions has been repeatedly held reversible error and cannot be cured by other instructions given by the court. Upon this question it is well to observe the statements made by counsel. Plaintiff's counsel stated





to the jury "We claim in this case, and we expect to prove to you, that the accident was caused in a large part, if not entirely, by the fact that there was a dense thick growth of bushes and shrubbery and undergrowth right on the southeast corner, which obstructed the view of anybody here (indicating) looking south, and which we claim obstructed the view of the motorman looking north". Defendant's counsel stated;

"The charge of negligence in this declaration is -- or complaint, rather, that we ran and operated this train at a high, negligent, dangerous rate of speed. That is one charge. The second charge is that we didn't blow a whistle when approaching the crossing". It would appear, therefore, that the jury was informed of the acts of negligence charged, and that the case was tried upon the issues presented. In the case of Dickson v. Swift Co., 238 Ill. 62, it was said;

"It has never been considered reversible error to refer the jury to the declaration unless they are required to determine a question of law as to what are the material allegations. (Paternal Army v. Evans, 215 Ill. 629)."

In Helakis v. Baring Coal Co., 246 Ill. 62, where plaintiff in error complained of an instruction given by the court to the effect that defendant in error could recover if the case was proved as alleged in the declaration, the court said; "While the practice of giving such an instruction is not to be commended, it is not reversible error where every count in the declaration contains the necessary allegations for recovery". In the instant case defendant's counsel clearly indicated to the jury the charges that were made as to the operation of the train at a dangerous rate of speed and failure to blow a whistle. Although we do not altogether agree with the form of the instruction, we are of the opinion that defendant is in no position to object, having waived its right to do so by making a statement to the jury advising them of the allegations of negligence charged.

There is also some complaint made as to improper conduct of plaintiff's counsel, but we have carefully considered the matters complained of and are of opinion that there is nothing here which would justify a new trial. There was no request that a juror be



to the jury the view in this case, and we expect to prove to you that the accident was caused in a large part, if not entirely, by the fact that there was a human thing about the business in this case and under power right on the southeast corner, which obstructed the view of anybody here (indicating) looking south, and which we claim obstructed the view of the motorist looking north. Defendant's counsel stated: "The course of negligence in this case is -- of defendant, first, that we ran and operated this train at a high, negligent, dangerous rate of speed. That is one charge. The second charge is that we didn't blow a whistle when approaching the crossing. It would appear, therefore, that the jury was instructed of the rate of negligence charged, and that the case was filed upon the issues presented. In the case of

Blackman v. City of St. Louis, 125 Ill. 47, it was said:

"It has never been considered proper to allow the jury to determine the question of law as to what was the proper negligence. (reference) City v. Evans, 115 Ill. 327."

In Blackman v. City of St. Louis, 125 Ill. 47, where plaintiff in error complained of an instruction given by the court to the effect that defendant in error could recover if the case was proved as alleged in the declaration, the court said: "This expectation of giving such an instruction is not to be commended, it is not reasonable error where every count in the declaration contains the necessary allegations for recovery". In the instant case defendant's counsel clearly indicated to the jury the charges that were made as to the operation of the train at a dangerous rate of speed and failure to blow a whistle. Although we do not disagree with the form of the instruction, we are of the opinion that defendant is in no position to object. Having waived its right to do so by making a statement to the jury advising them of the allegations of negligence charged.

There is also some complaint made as to improper conduct of plaintiff's counsel, but we have carefully considered the matters complained of and are of opinion that there is nothing here which would justify a new trial. There was no request that a jury be

withdrawn, but the outcome of the cause was submitted to the jury, and under the circumstances the defendant is not in a position to complain. A party having speculated as to the outcome of the cause and having submitted the cause to the jury, is not later in a position to complain. (G. & E. R. R. Co. v. Meech, 163 Ill. 305; Wettaw v. Retail Hdw. Mut. Fire Ins. Co., 287 Ill. App. 284.)

As to the verdict being excessive, this was a wrongful death case wherein the verdict was for \$5,000. The mother of decedent testified that decedent was a normal, healthy, alert child of 11 years who ran errands, participated in household activities and did all she could to help in them. Verdicts for the full statutory maximum of \$10,000 have been upheld in cases involving the wrongful death of minors (Petrovic v. City of Chicago, 251 Ill. App. 542, and Deming v. City of Chicago, 321 Ill. 341), and we are of the opinion that this point should not be urged as a ground for new trial.

After careful consideration of the questions called to our attention, we are of the opinion that the trial court was in error and abused its discretion in sustaining the motion for new trial. In passing upon the questions called to our attention, and, having reached the conclusion that the court erred in granting a new trial, the question then arises as to whether this court should enter judgment on the verdict here or remand the cause to the trial court with directions to enter judgment on the verdict. Upon this question, this court in the case of Mastin v. National Tea Company, 278 Ill. App. 60, said in its opinion;

"Upon an examination of par. 220, sec. 92, ch. 110, of the Civil Practice Act, Cahill's Ill. Rev. St. 1935, providing for the granting of powers to a reviewing court, under subsection (f) it is provided; 'Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require', which provision gives this court the power to enter the judgment that should have been entered by the trial court.



[illegible]



"For the reasons stated, the order of the court granting a new trial is reversed and set aside and judgment entered on the verdict of the jury in favor of the plaintiff and against the defendants in the sum of \$7,500.00."

Subsequently, on a petition for leave to appeal filed in the Supreme Court by the defendant in that action, the prayer of the petition for leave to appeal was denied.

However, for the reasons stated in the instant case and in accord with the opinion of the Supreme Court in the case entitled Scott v. Freeport Motor Casualty Co., 379 Ill. 155, the cause is reversed and remanded with directions that the trial court set aside the order granting a new trial and for further proceedings in due course. The cause will then proceed in the trial court according to law.

ORDER GRANTING NEW TRIAL REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS THAT THE COURT SET  
ASIDE THE ORDER GRANTING NEW TRIAL AND FOR  
FURTHER PROCEEDINGS IN DUE COURSE.

BURKE, P.J. AND XILEY, J. CONCUR.

For the reasons stated, the order of the court granting a new trial is reversed and set aside and judgment entered on the verdict of the jury in favor of the plaintiff and against the defendant in the sum of \$7,500.00.

Accordingly, on a petition for leave to appeal filed in the Supreme Court by the defendant in this action, for review of the petition for leave to appeal was denied.

However, for the reasons stated in the instant case and in accord with the opinion of the Supreme Court in the case entitled Scott v. Stewart Solar Specialty Co., 279 Ill. 120, the cause is reversed and remanded with directions that the trial court set aside the order granting a new trial and for further proceedings in the cause. The cause will then proceed in the trial court according to law.

CHIEF JUSTICE ROBERT H. FRANK  
JUDGES: JUSTICE WILLIAM J. BURTON  
JUSTICE JOHN L. CAMPBELL  
JUSTICE JOHN P. KELLY  
JUSTICE JOHN J. LEWIS  
JUSTICE JOHN F. MURPHY  
JUSTICE JOHN A. ROBERTS  
JUSTICE JOHN H. WATSON  
JUSTICE JOHN E. WYATT

WITNESSES: J. J. AND KILL, J. CHURCH

41917

WALLACE J. GOODRICH, administrator of  
the Estate of Frances Goodrich, Deceased,

APPEAL FROM

Appellant,

v.

CIRCUIT COURT

A. A. SPRAGUE, Receiver for the Chicago,  
North Shore & Milwaukee Railroad Company,  
a corporation,

COOK COUNTY.

Appellee.

314 I.A. 671<sup>4</sup>

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The petitioner, Wallace J. Goodrich, administrator of the estate of Frances Goodrich, deceased, plaintiff below, by his Amended and Supplemental Petition for Leave to Appeal (which was allowed and to which defendant - appellee filed an Answer) prays this court to grant leave to appeal from the order of the Circuit Court of Cook County entered June 20, 1941, granting a new trial in this cause. Petitioner represents that on July 23, 1937, plaintiff's decedent was killed by a train operated by defendant; that on January 7, 1938, petitioner filed his complaint in the Circuit Court of Cook County against defendant - appellee; that the case came on for jury trial and on March 7, 1939, the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$5,000.00. The defendant thereafter filed a motion for judgment notwithstanding the verdict, or for a new trial, and on June 23, 1939, the trial judge entered judgment for defendant notwithstanding the verdict, but did not rule upon the motion for new trial.

Upon a former appeal to this court, the defendant presented certain grounds for new trial. This court held, pursuant to section 68 (3)c of the Civil Practice Act, that no error appeared in the grounds urged for new trial which would entitle the defendant to a new trial, and in accordance with this holding entered judgment upon the jury's verdict. (Goodrich v. Sprague, 304 Ill. App. 556).



THE STATE OF TEXAS, COUNTY OF DALLAS, ss.

I, JAMES A. HARRIS, Clerk of the County of Dallas, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files of the County Clerk.

WITNESSED my hand and the seal of the County of Dallas, this 11th day of May, 1937.

James A. Harris, Clerk.

11017

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the County of Dallas, this 11th day of May, 1937.

The petitioner, James A. Harris, Administrator of the

estate of Francis Harrison, deceased, claims that he is

entitled to and has been wrongfully deprived of the same by

the defendant, James A. Harris, Administrator of the

estate of Francis Harrison, deceased, and that he is entitled to

the same by virtue of the fact that he is the only surviving

issue of the said Francis Harrison, deceased, and that he is

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The defendant thereafter sued out a writ of error in the Supreme Court of Illinois, contending inter alia, that section 68 (3)c was unconstitutional in so far as it authorized the Appellate Court to pass upon grounds for new trial which had not been ruled upon by the trial court. The Supreme Court held that such action was not within the appellate jurisdiction of the Appellate Court and that the case must be remanded to the trial court to pass upon the motion for new trial. The Supreme Court affirmed the decision of the Appellate Court in reversing the judgment notwithstanding the verdict and held that the case was properly submitted to the jury. (Goodrich v. Sprague, 376 Ill. 80).

Upon reinstatement and redocketing in the Circuit Court, the motion for new trial was considered on June 20, 1941 by the trial Judge, who granted the motion for new trial. Although the trial Judge stated the reasons for his decision in an oral opinion, he refused to approve the court reporter's transcript of his opinion, on the ground that it was not sufficiently meritorious for presentation to this court.

From the facts and testimony concerning this accident, it appears that the deceased was killed by a train operated by the defendant in the Village of Glencoe where Woodlawn Avenue crosses at grade the tracks of both the North Shore electric Railroad and the Chicago and Northwestern steam railroad. Both sets of tracks at this point are parallel and run nearly north and south; Woodlawn Avenue runs nearly east and west, intersecting the railroad tracks at an angle. The double tracks of the two railroads run parallel to each other from Harbor Street, which is about 1228 feet north of Woodlawn Avenue, to a point 878 feet south of Woodlawn Avenue, where the Northwestern tracks continue south, and the North Shore tracks curve to the east. At the Woodlawn Avenue crossing the distance between the two sets of tracks is 53 feet. The tracks of the Northwestern lie to the west and are on a higher elevation





than the North Shore tracks, the difference in elevation being 3 feet 6½ inches. On the north side of Woodlawn Avenue are the North Shore passenger station platforms, which station the local North Shore trains use, but which is not used by the express and special trains. The station for Northwestern steam trains is at Hubbard Woods, south of Woodlawn Avenue.

The neighborhood east of the tracks is residential, with about four dwellings to the acre and one or two parks. One of these parks extends south from Woodlawn Avenue adjacent to the North Shore right of way, and is used as a playground for children. The right of way owned by the North Shore from Woodlawn Avenue to the south extends 52 feet east of the east rail. There are poles, brush, shrubbery and trees on this right of way extending all the way from Woodlawn Avenue to Scott Avenue, the line of poles being about seven feet east of the east rail and the line of trees about 10 or 12 feet further east, ranging from 17 to 20 feet east of the North Shore tracks. There is some conflict in the evidence as to how close the shrubbery and brush was to the east rail. Plaintiff's picture, Exhibit 3 taken on the day of the accident and the testimony of plaintiff's witnesses' evidence that there was a heavy growth of shrubbery extending fully as far west as the line of poles, and also some bushes between the poles and the tracks. For the defendant, the motorman, Schmidt, testified that the brush and shrubbery were about twenty feet from the rail. Defendant's exhibits show less brush and shrubbery than plaintiff's evidence indicated, but these pictures were taken on July 28, 1937, five days after the event and two witnesses testified that these photographs did not correctly portray the crossing as it was on July 23, 1937 because brush and shrubbery had been removed a few days after the event.

that the North Shore Road, the driveway is located along the  
 West of the road. On the north side of the road between the  
 North Shore Road and the driveway, which is located on the  
 North Shore Road, but which is not used as a driveway and  
 special train. The station for North Shore Road is  
 at North Shore Road, North of North Shore Road.  
 The neighborhood east of the road is residential, with  
 about four dwellings to the east and one on the south. One of  
 these houses extends south from North Shore Road to the  
 North Shore Road, and is used as a driveway for children.  
 The right of way owned by the North Shore Road extends south to  
 the south extends to the east of the road. There are trees,  
 brush, shrubbery and trees on this right of way extending all the  
 way from North Shore Road to West Avenue, the line of North Shore  
 about seven feet east of the road and the line of trees  
 about 10 or 12 feet further west, running from 10 to 12 feet west  
 of the North Shore Road. There is some shrubbery in the vicinity  
 as to how close the shrubbery and brush was to the road.  
 Plaintiff's picture, which is taken on the day of the accident and  
 the testimony of Plaintiff's witnesses' evidence is that there was  
 a heavy growth of shrubbery extending fully as far west as the line  
 of trees, and also some bushes between the poles and the road.  
 For the defendant, the testimony, which is testified that the bushes  
 and shrubbery were about twenty feet from the road. Defendant's  
 evidence shows that there was shrubbery between Plaintiff's evidence  
 indicated, but these pictures were taken on July 23, 1917, five  
 days after the event and two witnesses testified that these photographs  
 did not correctly portray the crossing as it was on July 23, 1917  
 because brush and shrubbery had been removed a few days after the  
 event.

There are no gates at the crossing. The warning system consists of four signal posts. All four have flashing red lights and two have bells in addition. For convenience, these posts are herein designated respectively, A, B, C, and D. Signal post A is located on the north side of Woodlawn Avenue, just east of the North Shore tracks, and is equipped with both a bell and a flasher. Signal post B is on the south side of Woodlawn Avenue, between the tracks of the two railroads, but closer to the North Shore tracks. It has a flasher but no bell. Signal post C is on the north side of Woodlawn Avenue, between the two sets of tracks, but closer to the Northwestern tracks, and likewise has a flasher but no bell. Signal post D is located on the south side of Woodlawn Avenue, west of the Northwestern tracks, and like post A has both bell and flasher. Thus, the two outside posts have both bells and flashers, while the two inside posts have flashers only. These signals operate as follows. When trains are approaching the crossing on both lines, all four signals operate. If only a North Shore train is approaching, then only signal posts A, B and D operate; signal post C does not operate. If only a Northwestern train is approaching, then signals A, C and D operate and signal post B does not. That is, signal post A and D (the ones with the bells) operate whenever a train is approaching the crossing on either railroad; signal post B is actuated only by North Shore trains.

These signals are operated automatically, by means of electricity. When a train crosses a certain point in the rail, known as a cut-in point, the signals begin to function. The cut-in point for Northbound trains on the North Shore tracks is located 1160 feet south of the Woodlawn Avenue crossing; this point is south of the curve in the North Shore tracks. The cut-in point for northbound trains on the Northwestern tracks is 3072 feet south of the crossing, which is south of the Hubbard Woods station.



There are no yards at the crossing. The main line is  
located on the north side of Woodman Avenue, just east of the North  
River crossing, and is equipped with both a main and a branch signal.  
Post 1 is on the south side of Woodman Avenue, between the crossing  
of the two railways, but closer to the North River crossing. It  
has a flasher but no bell. Signal post 2 is on the north side of  
Woodman Avenue, between the two sets of tracks, but closer to the  
Northwestern crossing, and likewise has a flasher but no bell. Signal  
post 3 is located on the south side of Woodman Avenue, west of the  
Northwestern crossing, and like post 1 has both bell and flasher.  
Thus, the two outside posts have both bell and flasher, while the  
two inside posts have flasher only. These signals operate as  
follows. When trains are approaching the crossing on both lines,  
all four signals operate. If only a North River train is approaching,  
then only signal posts 1, 2 and 3 operate; signal post 4 does not  
operate. If only a Northwestern train is approaching, then signals  
1, 2 and 3 operate and signal post 4 does not. That is, signal posts  
1 and 2 (the ones with the bells) operate whenever a train is  
approaching the crossing on either railway; signal post 3 is  
actuated only by North River trains.  
These signals are operated automatically, by means of  
electricity. When a train crosses a certain point in the rail, known  
as a cut-in point, the signal begins to function. The cut-in point  
for Northwestern trains on the North River tracks is located 1150 feet  
south of the Woodman Avenue crossing; this point is south of the  
curve in the North River tracks. The cut-in point for northbound  
trains on the Northwestern tracks is 800 feet south of the crossing,  
which is south of the Hubert Road station.

This accident happened on July 23, 1937, at about 6:00 P.M. daylight saving time. It was a clear day; the sun was out but beginning to set. Decedent approached the crossing from the east, on the south sidewalk. She was going slowly, and gradually slowed down her bicycle until she came to a stop with one foot on the pedal of her bicycle and the other on the ground. The front wheel of her bicycle was either just touching the rail or just short of it. The bells at the crossing were ringing as she approached prior to the impact, due in part at least to the presence of a Northwestern steam train, headed north standing at the Hubbard Woods station. Just before the train hit decedent she made an unsuccessful attempt to move back, but it was too late.

There is a conflict in the evidence as to how long decedent was at the track before she was hit; whether or not the train whistle was blown; how fast the train was going; and how far the train traveled after the brakes were applied. Witnesses Sullivan and Mrs. Turner, eye witnesses to the occurrence, testified that decedent was in a stationary position for fifteen to thirty seconds before she was hit. Curby, another eye witness, corroborated this; he further testified that he saw the girl waiting there, and after the train rounded the curve at Scott Avenue he arose from his seat, moved to the edge of the platform and waved his hand up and down four or five times as a signal to the motorman to blow his whistle. The motorman, Schmidt, testified that he did not see decedent until he was about 150 feet from the crossing at which time she emerged from behind a tree; she kept coming and stopped near the rail and was only there a very few seconds before he hit her. The witness Sullivan testified that no whistle was blown until just about the moment of impact and Curby said he heard no whistle at all before the crash. Motorman, Schmidt, testified that he blew four or five short blasts on the whistle as soon as he saw decedent at which time he was 150 feet from the crossing. The testimony of other





members of the train crew (who were on duty in the coaches) tended to corroborate Schmidt's testimony as to the distance of the train from the crossing when the whistle was blown, but they heard only one blast of the whistle.

There was evidence that the speed of the train was about 40 to 45 miles per hour, and witness, Tanney, testified that it was possible that the train was going 45 or 50 miles an hour but that he doubted it. There is a conflict in the evidence as to how far the train traveled after the accident. Witness Sullivan testified that there were five cars in the train and that it ran  $2\frac{1}{2}$  to 3 times its length after the accident. Curby agreed that it was a four or five car train. The length of a car is about 60 feet. The members of the train crew testified that the train was composed of three cars and that it traveled about 500 feet from the point where the brakes were applied to the point where the train came to a stop.

Mrs. Goodrich, mother of decedent, and a school teacher, both testified regarding decedent's age, experience, intelligence and capacity. At her death, she was 11 years and 3 months old, and was about four feet eleven inches tall; her hearing and sight were normal; she was a good student, alert and interested in everything, and was a little above the average in intelligence and capacity; she took part in plays, singing, swimming, art and dancing. She had been riding a bicycle since she was seven years of age, but it had been only a few months since she had gone any distance from her home, which was in Winnetka, about one block west of the tracks. Decedent had some friends who lived east of the tracks some blocks to the south of Woodlawn Avenue, and visited them occasionally, but most of the time she was taken there by her mother or by the mothers of her friends. She had been allowed to cross the tracks by herself for only a year. Mrs. Goodrich testified that to her knowledge the only crossing her daughter had crossed on a bicycle was El Dorado Avenue in Winnetka, which crosses the tracks of both railroads, and that

members of the train crew (and were on duty in the engine) looked to the locomotive engineer's testimony as to the position of the train from the crossing when the whistle was blown, but they heard only one blast of the whistle.

There was evidence that the speed of the train was about

40 to 45 miles per hour, and witness, Gannay, testified that it was possible that the train was going at 50 miles an hour but that he doubted it. There is a conflict in the evidence as to how far

the train traveled after the accident. Witness Sullivan testified

that there were five cars in the train and that it was 15 feet long

its length after the accident. Gannay agreed that it was a four or

five car train. The length of a car is about 30 feet. The number

of the train crew testified that the train was composed of three

cars and that it traveled about 500 feet from the point where the

brakes were applied to the point where the train came to a stop.

Mr. Goodrich, mother of deceased, had a school teacher,

both testified regarding deceased's age, experience, intelligence

and capacity. At her death, she was 11 years and 3 months old, and

was about four feet eleven inches tall; her hearing and sight were

normal; she was a good student, alert and interested in everything,

and was a little above the average in intelligence and capacity;

she took part in plays, singing, dancing, etc. and dancing. She

had been riding a bicycle since she was seven years of age, and

it had been only a few months since she had been riding from

her home, which was in Lincoln, about one block west of the track.

Deceased had some friends who lived west of the track near blocks

to the south of Woodlawn Avenue, and visited them occasionally, but

most of the time she was taken there by her mother or by the mother

of her friends. She had been allowed to cross the tracks by herself

for only a year. Mrs. Goodrich testified that in her knowledge she

only observed her daughter had crossed on a bicycle at 11 months of age



the El Dorado Avenue crossing is protected by gates.

The motion for new trial alleges in general terms that the trial court erred in excluding proper evidence offered by defendant and in admitting improper evidence offered by plaintiff.

The Supreme court, in passing upon the questions involved in the case of Goodrich v. Sprague, 376 Ill. 80, said;

"Viewed in the light of the rule that if evidence supporting plaintiff's claim appears in the record the cause should be submitted to a jury, we are of the opinion that such evidence exists in this record, and unless it can be said that deceased was guilty of contributory negligence, as a matter of law, which we do not think can be said on this record, the issues of negligence and contributory negligence are questions that were properly submitted to the jury."

Further, the court there said in its opinion;

"Photographs were introduced in evidence showing the condition of the right of way of the 'North-Shore' electric lines. There is evidence in the record that trees and shrubs grew to within 10 or 15 feet of the east side of the east track, immediately south of Woodlawn Avenue. Its right-of-way there extended 50 feet east of the east track. The statute required that it clear its right-of-way of trees and shrubs for a distance of 500 feet on either side of a crossing. This means all the width of its right-of-way. That was not done in this case."

Upon this question defendant's counsel made the statement that "the east right-of-way line of the Chicago North Shore & Milwaukee Railroad Company, south of Woodlawn Avenue is 52 feet east of the east rail of the north bound tracks. This plat shows a line of trees 20 feet east of the east rail of the north bound tracks of the Chicago, North Shore & Milwaukee Railroad Company, as shown on this plat." It clearly appears that brush, shrubbery and trees grew on defendant's right-of-way south of Woodlawn Avenue. Mr. Young, Village Manager of Glencoe, testified that a line of poles stretched along the right-of-way at about 7 feet from the east rail of the North Shore tracks and that the line of trees was 10 or 12 feet farther east than the poles. These trees were poplars or cottonwoods with low hanging branches, and the underbrush extended as far west at the line of trees, if not a little farther. Other witnesses testified that the bushes and shrubbery extended right up to the telephone poles, and that there were bushes between the poles and the tracks.



and in doing so was creating in violation of law.  
The motion for new trial likewise is granted. The  
trial court erred in excluding proper evidence offered by defendant  
and in admitting improper evidence offered by plaintiff.  
For reasons stated, in setting aside the verdict rendered  
in the case of Woodward v. Chicago, 378 Ill. 62, 63, 64;

"Viewed in the light of the facts that if evidence submitted  
in plaintiff's claim against the estate the estate should be  
admitted to a jury, we are of the opinion that such evidence  
admitted in this case, and unless it can be said that defendant  
erred in excluding such evidence, as a matter of law, which we  
do not think can be said in this case, the issue of negligence  
and contributory negligence was submitted to the jury  
submitted to the jury."

Further, the court there said in its opinion:

"Photographs were introduced in evidence showing the  
condition of the right of way of the 'North-South' electric line.  
There is evidence in the record that there was a cross street  
which is to the east of the right of way of the north branch, immediately  
south of Woodlawn Avenue. The right-of-way there extended 55 feet  
east of the cross street. The witness testified that it was the  
right-of-way of the north branch for a distance of 500 feet in  
either side of a cross street. This would give the width of the right-  
of-way. That was not done in this case."

Upon this question defendant's counsel made the statement that the  
east right-of-way line of the Chicago North West & Minnesota Railroad  
Company, south of Woodlawn Avenue is 55 feet east of the west rail  
of the north branch tracks. This also shows a line of trees 55 feet  
east of the west rail of the north branch tracks of the Chicago  
North West & Minnesota Railroad Company, as shown on said plan.  
It clearly appears from the plan, however, and from the defendant's  
right-of-way south of Woodlawn Avenue, that the line of trees  
of Chicago, testified that a line of trees extended along the right-  
of-way at least 7 feet from the west rail of the north branch tracks  
and that the line of trees was 10 to 12 feet farther east than the  
cross street. These trees were located at crosswalks with low hanging  
branches, and the underground extended as far west as the line of  
trees, at not a little farther. Other witnesses testified that the  
branches and shrubbery extended right up to the telephone poles, and  
that there were bushes between the poles and the tracks.

The purpose of the statute requiring that rights-of-way be cleared near crossings seems clearly to have been to (1) enable the motorman to see people at or near the tracks, and (2) afford to people approaching the crossing an unobstructed view of the tracks and crossing. The Supreme Court, in Goodrich v. Sprague, (supra), further said;

"There is evidence that one approaching the crossing from the east on the south side of Woodlawn Avenue, as did the deceased, would have to come within a comparatively few feet of the northbound track before having a clear view for any considerable distance down the track."

There is also the testimony given by the motorman that he "didn't see her until she came out from behind a tree there. That tree stands about fifteen or twenty feet from the east rail of the northbound track. I first saw her when she came from behind that tree. The moment I saw her I jumped up and took my hand off the power and threw the train in emergency . . . I could have done nothing else to stop the train . . . A large tree prevented me from seeing the little girl before the time when she was 15 feet from the rail . . . I saw her just as she emerged from behind that tree. What prevented me from seeing her before she got to that tree were the trees further back which obstructed the view. There are trees all along there obstructing the view." There were other witnesses who testified that decedent was in a stationary position, with her bicycle wheel very close to the east rail, for a period of fifteen to thirty seconds. It appears also that the space of 53 feet between the two railroads gives ample space to stand in safety. The local passenger station for south bound trains is located in that space, and, since people can wait in safety between the two railroads, there is an inducement to pedestrian or cyclist to regard each set of tracks as separate crossings, and it was natural for decedent to approach the track to see if a train was coming on the North Shore track. There is evidence that the signals were operating about the time when decedent approached the track. There was a Northwestern train standing at Hubbard Woods





station, which caused the bells to ring, and which had been standing there for at least five minutes before decedent stopped at the crossing. Signal post B, which was in decedent's direct line of vision, did not start to flash until after she came to a stop. It appears from the evidence that decedent looked south toward the Northwestern train standing at the Hubbard Woods station, which logically enough was the reason for the ringing bells, and strengthened the conclusion reached from the non-operation of signal post B that no North Shore train was approaching. When the signal on post B finally did begin to flash, it escaped decedent's attention for the change it created in the surroundings was slight and hardly noticeable in view of the Northwestern train and the continuous ringing of the bells. It would appear, as suggested, that because of defendant's violation of the statute it was impossible for decedent to look south down the North Shore tracks due to the curve of the tracks without placing herself in a position of danger. There was a heavy growth of shrubbery extending as far west as the line of telephone poles and there were some bushes between the poles and the track. The line of telephone poles was only 7 feet from the east rail, and, due to the overhang of the car from the rail and the distance from the seat of the bicycle to the front wheel, six feet from the tracks was the minimum point of safety for decedent. There were no gates or barriers. The sidewalk crosses the tracks at grade, with smooth boards flush with the rails; a child would not be able to see where the tracks were, without putting herself within the danger zone. It appears from the facts detailed that defendant violated the statute and that decedent's view was obscured in such manner as could have caused her unwittingly to place herself in a position of danger in order to determine whether a train was coming.

Defendant contends, however, that since there were signals decedent was bound to heed them, and that if she did not do so, her death was not the proximate result of the violation of the statute.

station, which opened the rails to him, and which was then standing  
there for at least five minutes before descending stopped at the crossing.  
Signal post 2, which was in defendant's direct line of vision, did  
not start to flash until after she came to a stop. It is true that  
the evidence that defendant looked toward the Northwestern  
train standing at the Hubbard House station, which logically enough  
was the reason for the ringing bells, and strengthened the conclusion  
reached from the non-operation of signal post 2 that no North  
Western train was approaching. When the signal on post 2 finally did begin  
to flash, it required defendant's attention for the change it made  
in the surroundings was slight and hardly noticeable in view of the  
Northwestern train and the continuous ringing of the bells. It would  
appear, we suggest, that because of defendant's violation of the  
statute it was impossible for defendant to look south down the track  
more than a few feet from the curve of the track without blinding herself  
in a position of danger. There was a heavy growth of shrubbery  
extending as far west as the line of telephone poles and there were  
some bushes between the poles and the track. The line of telephone  
poles was only 7 feet from the east rail, and, due to the overhang  
of the car from the rail and the distance from the east of the  
signals to the front wheel, six feet from the track was the minimum  
point of safety for defendant. There were no gates or barriers. The  
signals across the tracks at grade, with manual points flash with  
the rails; a child would not be able to see where the tracks were,  
without putting herself within the danger zone. It appears from the  
facts stated that defendant violated the statute and that defendant's  
view was obscured in such manner as could have caused her unwittingly  
to place herself in a position of danger in order to determine whether  
a train was coming.

Defendant contends, however, that since there were signals  
defendant was bound to heed them, and that if she did not do so, her  
death was not the proximate result of the violation of the statute.

In this regard, even though the crossing was so laid out and the signal system so constructed that it was reasonably to be expected that decedent would approach the crossing to see if a train were coming, still, the legislative purpose in enacting the brush statute was to insure to the public, using that crossing, the benefit of a clear view, in addition to any other warning devices which the railroad might erect. That defendant violated the statute is sustained by the facts in evidence, as well as being the fixed law in this case by the decision of the Supreme Court. (Goodrich v. Sprague, supra.)

There is ample evidence in the record from disinterested witnesses from which the jury could find that decedent and her bicycle were in a stationary position, near the east rail, for a period of 15 to 30 seconds before she was struck. It is contended that the failure of the motorman to see decedent standing at the crossing, or his neglect to warn her of her danger, if he did see her, was negligent. It does appear that the weight of the evidence supports plaintiff's position. There is a question as to when the motorman saw decedent. If he saw her as soon as he rounded the curve at Scott Avenue, he was negligent in not blowing his whistle in time to warn her. There is also some conflict as to when the whistle was actually blown. All of defendant's witnesses, it seems, conceded that no whistle was blown until the train was 150 feet from the crossing. Indeed, all the evidence shows negligent failure to blow the whistle in time to avoid the accident. If the motorman did not see decedent until he was almost upon her, it was because his view of the crossing was obstructed by the trees and shrubbery. These facts were before the jury and it was for the jury to say whether the motorman properly signaled. The fact is that the motorman failed to blow his whistle while decedent was stationary at the crossing for 15 to 30 seconds, and can be accounted for in three ways; first, he wasn't looking; second, he saw her, but still failed to warn her; third, he was prevented from seeing her by the trees and



In this regard, even though the witness was as far as the signal  
 system as concerned that it was necessary to be reached that  
 defendant would approach the crossing in view of a train was coming,  
 still, the legislative purpose in passing the statute was to  
 known to the public, under that condition, the benefit of a clear  
 view, in addition to any other warning device which the railroad  
 might erect. That defendant violated the statute is contained by  
 the facts in evidence, as well as being the fact in this case  
 by the decision of the Supreme Court. (*Griffin v. Sawyer*, 338 U.S. 369.)

There is ample evidence in the record that defendant  
 witness from which the jury could find that defendant and her vehicle  
 were in a stationary position, near the next rail, for a period of  
 15 to 20 seconds before the accident. It is contended that the  
 failure of the witness to see defendant standing at the crossing,  
 of his neglect to warn her of her danger, if he did not see her, was  
 negligent. It is also contended that the witness was negligent  
 plaintiff's position. There is a question as to when the witness  
 saw defendant. If he saw her as soon as he rounded the curve at foot  
 Avenue, he was negligent in not placing his vehicle in time to warn  
 her. There is also some conflict as to when the whistle was  
 actually blown. All of defendant's witnesses, it seems, contended  
 that the whistle was blown until the train was 100 feet from the  
 crossing. Indeed, all the witnesses show negligent failure to give  
 the whistle in time to avoid the accident. If the witness did not  
 see defendant until he was almost upon her, it was because his view  
 at the crossing was obstructed by the trees and shrubbery. These  
 facts were before the jury and it was for the jury to say whether  
 the witness properly testified. The fact is that the witness  
 failed to place his vehicle while defendant was stationary at the  
 crossing for 15 to 20 seconds, and can be accounted for in three ways;  
 first, he wasn't looking; second, he saw her, but still failed to  
 warn her; third, he was prejudiced from seeing her by the trees and

shrubbery which were admittedly on the right of way in violation of statute. It would appear from the facts that the greater weight of the evidence indicates that there was negligence in not giving the required warning.

The next thing we have to consider is the speed of the train at the time. The rate of speed at which a train may be operated depends on the peculiar facts of each individual case, and, whether or not a given rate of speed is negligent, is a question of fact for the jury, unless the court is of the opinion that as a matter of law, under the facts of the particular case, no reasonable jury could find the speed unreasonable. (Landon v. Chicago & G.T. Ry. 92 Ill. App. 216; Cleveland v. Cleveland, C. C. & St. L. Ry., 169 Ill. App. 157; Brundage v. Chicago, B. & Q. R. R., 245 Ill. App. 440.) It appears from the evidence that all witnesses who testified estimated the speed of the train to have been at least 40 miles per hour. Several witnesses, including defendant's trainmen, estimated the speed at 40 to 45 miles. While this speed may be safe at some crossings, the jury might properly have found that such speed was not reasonable in this case where children customarily played in a park adjacent to the right of way, where the view was obstructed, the warning signals confusing, and where no warning was given by blowing a whistle. Considering these facts, which are of course matters for the jury, and which, no doubt, were considered by it in reaching the verdict of guilty and assessing plaintiff's damages in the sum of Five thousand dollars, we find no reason for disturbing the jury's verdict.

Likewise, the question whether a child of eleven years of age is guilty of contributory negligence is a question for the jury. The decisions in this state lay down the rule that whether a child between the ages of 7 and 14 is guilty of contributory negligence in a particular case, is an open question of fact and must be left to the jury. The jury's verdict on this question should stand. Aside from the foregoing rule, it is contended that there was ample evidence

circumstances which were essentially as the result of any in violation of statute. It would appear from the facts that the greater weight of the evidence indicates that there was negligence in not giving the required warning.

The next thing we have to consider is the speed of the train

at the time. The rate of speed at which a train may be operated depends on the peculiar facts of each individual case, and, whether or not a given rate of speed is negligent, is a question of fact for the jury, unless the court is of the opinion that as a matter of law,

under the facts of the particular case, no reasonable jury could

find the speed unreasonable. (*Union v. Western & N. Ry.*, 92 Ill.

App. 218; *Illinois v. Cleveland, C. & N. Ry.*, 109 Ill. App.

127; *Franklin v. Chicago, N. & W. Ry.*, 243 Ill. App. 460.) It

appears from the evidence that all witnesses who testified witnessed

the speed of the train to have been at least 40 miles per hour.

Several witnesses, including defendant's witness, testified the speed

at 40 to 45 miles. While this speed may be safe at some crossings,

the jury might properly have found that such speed was not reasonable

in this case where children customarily played in a park adjacent to

the right of way, where the view was obstructed, the warning signals

omitted, and where no warning was given by blowing a whistle.

Considering these facts, which are of course matters for the jury, and

which, no doubt, were considered by it in reaching the verdict of

guilty and assessing plaintiff's damages in the sum of five thousand

dollars, we find no reason for disturbing the jury's verdict.

Likewise, the question whether a child of eleven years of

age is guilty of contributory negligence is a question for the jury.

The decisions in this state lay down the rule that whether a child

between the ages of 7 and 14 is guilty of contributory negligence in

a particular case, is an open question of fact and must be left to

the jury. The jury's verdict on this question stands. And

from the foregoing, it is concluded that there was negligence



in the record to show that decedent exercised that degree of care which a child of her age, capacity, intelligence and experience would have exercised under the same or similar circumstances, and it is urged by plaintiff that on the evidence, it was for the jury alone to decide whether decedent was guilty of contributory negligence, citing Chicago & Alton R. R. v. Pearson, 184 Ill. 386, and Elgin, J. & L. Ry. v. Lawlor, 229 Ill. 621, and other cases.

The real question which we ought to consider in this matter is whether a new trial may be granted where the questions have been submitted to the jury to determine the weight of the evidence and credibility of the witnesses. As suggested in People v. Hanisch, 361 Ill. 465, the jury's verdict may not be lightly set aside. The court there said;

"Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of the witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

See also Russell v. Richardson, 302 Ill. App. 589.

The defendant, however, cites Gavin v. Kater, 276 Ill. App. 308, on the question of whether or not there was an abuse of discretion on the part of the trial court in granting a new trial, where the court said;

"In passing upon the merits of the instant contention it must be borne in mind that this is an appeal from an order of the trial court granting a new trial. If judgment had been entered upon the verdict and the appellees were here claiming that the evidence did not warrant the verdict, the question of the preponderance of the evidence would not arise in this court and we would not be warranted in disturbing the verdict of the jury unless the verdict was clearly against the manifest weight of the evidence. But, under the new Practice Act . . . this appeal concerns the action of the trial court in granting a new trial. A trial court has more latitude than this court in passing upon the verdict of the jury. The allowance or refusal of a new trial upon the weight of the evidence is peculiarly within the discretion of the trial court and he is warranted in granting a new trial if a plaintiff has failed to sustain his claim by a preponderance of the evidence. In passing





upon the question as to whether or not the trial court in such case was justified in granting a new trial, we must bear in mind that there are many things which a trial judge observes on a trial that do not appear from the printed record, - the appearance of a witness, his or her manner of testifying, and other circumstances that greatly aid the trial court in determining the credibility of a witness and the weight, if any, that should be attached to his or her testimony."

However, in considering this case, the allegations in the complaint of negligent acts on the part of the defendant must be considered, and also as to whether plaintiff has sustained any one or more of them. From the cases called to our attention the rule seems to be that a new trial should not be granted unless the verdict is manifestly against the weight of the evidence. We are of the opinion that the court erred in granting a new trial on the facts and issues here involved, and are of the opinion that plaintiff's case was supported by a preponderance of the evidence. This conclusion we have carefully considered and under the facts and circumstances as detailed by the witnesses and exhibits offered, we conclude that there was such a preponderance of evidence for plaintiff's case which did not justify the trial court in granting a new trial.

Objection was made to the admission and exclusion of certain evidence. A section foreman employed by defendant was produced for the purpose of showing that no brush or shrubbery was cut at the scene of the accident before defendant's photographs were taken. He made certain reports of the work done by himself and his crew; he used these reports to refresh his recollection, and having refreshed his recollection testified in full as to the work done. The reports were then excluded. In regard to writings used to revive recollection, it is said in Wigmore on Evidence, 3rd Ed. Vol. III, sec. 763, p. 112, "That the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." In Davis v. Michigan Central R. R. Co., 294 Ill. 355, it was said that; "The entries in the book kept by the car inspector who examined the draw-bars and couplers on the day of the accident were properly excluded from the jury. A witness for plaintiff in



upon the question as to whether or not the trial court in such case was justified in granting a new trial, we must look to the law. There are many things which a trial judge is entitled to do which do not appear from the printed record. - The suggestion of a witness, his own manner of testifying, and other circumstances in a trial aid the trial court in determining the credibility of a witness and the weight, if any, that should be attached to his or her testimony."

However, in considering this case, the allegations in the

complaint of negligent acts on the part of the defendant were so considered, and also as to whether plaintiff has sustained any one or more of them. From the facts stated in our opinion the facts seem

to be that a new trial should not be granted unless the verdict is manifestly against the weight of the evidence. We are of the opinion that the court erred in granting a new trial on the facts and issues here involved, and are of the opinion that plaintiff's case was supported by a preponderance of the evidence. This conclusion we have carefully considered and under the facts and circumstances as stated by the witnesses and exhibits offered, we conclude that there was a preponderance of evidence for plaintiff's case and that the court justly and lawfully erred in granting a new trial.

Objection was made to the admission and exclusion of certain evidence. A motion to suppress was made by defendant and was granted for the purpose of showing that no search or seizure was made of the person of the defendant before defendant's photograph was taken. He made certain reports of the work done by himself and his crew. He made these reports to reflect his production, and having reflected his production testified in full as to the work done. The reports were then admitted. In regard to witness used to prove production, it is said in evidence on evidence, Vol. 1, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 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error was permitted to testify as to all the facts contained in the entries and was permitted to refresh his memory from the entries made by him in the book kept by him. There is no rule of evidence making such entries admissible where the making of them is in no way brought in issue. They were made after the accident and were self-serving declarations."

There is also a contention made by defendant that there was error in admitting in evidence plaintiff's exhibit 3. This photograph was admitted with the following instruction to the jury;

"Now I would like to comment that in that photograph there is a superimposed - well, that is in the photograph itself, the picture of boy and a bicycle. It appears that the Tribune Reporter from the witness stand stated that a policeman indicated to him the position of the bicycle and the little girl at the time of the accident. Now, the jury is to disregard entirely the position of the bicycle and the boy in the picture, because the position of the bicycle, as told to the Tribune Reporter by the policeman, is not evidence, the policeman not having been an eyewitness to the accident. Therefore, I am letting this photograph go into evidence with the admonition to the jury that they are to disregard entirely the position of the bicycle and also the persons shown in this photograph, and it is admitted merely for the purpose of showing the physical surroundings."

This photograph was the only photograph showing the condition of the brush and shrubbery which was taken the same day as the occurrence, defendant's photographs having been taken five days later and there was evidence by disinterested witnesses that these pictures did not correctly show the condition of the brush and shrubbery at the time of the occurrence because it had been cut down in the intervening period. Defendant's own witness testified that on July 24th (the day after the occurrence) his crew were mowing grass along this stretch. The purpose of evidence being to get at the truth, all evidence and particularly photographic evidence which portrays the condition as it was at the moment of the occurrence, should be admitted unless there is some compelling reason in law or logic for keeping it out. There seems to have been other evidence of witnesses familiar with the right of way, who testified that the photograph correctly portrayed the conditions of the shrubbery at the time of the accident. From



error was permitted to testify as to all the facts contained in the entries and was permitted to refresh his memory from the entries made by him in the past sent by him. There is no rule of evidence which would render inadmissible the making of such notes in no way prejudicial in fact. They were made after the fact and were self-serving.

There is also a contention made by defendant that there was error in admitting in evidence Plaintiff's Exhibit 2. This photograph was admitted with the following limitation to the jury:

"Now I would like to comment that in that photograph there is a supposition - well, that is in the photograph itself, the picture of boy and a bicycle. It appears that the witness, Plaintiff, stated that a policeman indicated to him the location of the bicycle and the little girl at the time of the accident. Now, the jury is to determine entirely the location of the bicycle and the boy in the picture, because the location of the bicycle, as told to the witness, is not to be taken as evidence. The witness has not given any evidence to the jury. Therefore, I am telling this photograph is into evidence with the restriction to the jury that they are to determine entirely the location of the bicycle and also the person shown in this photograph, and it is admitted merely for the purpose of showing the physical surroundings."

This photograph was the only photograph showing the condition of the brush and shrubbery which was taken the day of the occurrence. Defendant's photographs having been taken five days later and there was evidence by Plaintiff's witnesses that these pictures did not correctly show the condition of the brush and shrubbery at the time of the occurrence because it had been cut down in the intervening period. Defendant's own witness testified that on July 19th (the day after the occurrence) his own wife moving front this street. The purpose of evidence being to set at the truth, all evidence and particularly photographic evidence which purports the condition as it was at the moment of the occurrence, should be admitted unless there is some compelling reason in law or logic for keeping it out. There seems to have been other evidence of witnesses familiar with the right of way, who testified that the photograph correctly portrayed the condition of the shrubbery at the time of the accident. From



what appears in the record the court did not err in admitting the photograph.

The defendants contend that there are certain errors in giving instructions requested by plaintiff and call attention to the following instruction;

"If you believe upon a preponderance of the evidence that on or about July 13, 1937, Frances Goodrich was struck and killed by a train of the defendant; and if you believe that the death of the said Frances Goodrich was proximately caused by the negligence of the defendant as charged in the complaint, then if you also find that Frances Goodrich was both before and at the time of the accident in the exercise of ordinary care for her own safety, you should find the defendant guilty."

Defendant seriously contends that the giving of similar instructions has been repeatedly held reversible error and cannot be cured by other instructions given by the court. Upon this question it is well to observe the statements made by counsel. Plaintiff's counsel stated to the jury "We claim in this case, and we expect to prove to you, that the accident was caused in a large part, if not entirely, by the fact that there was a dense thick growth of bushes and shrubbery and undergrowth right on the south-east corner, which obstructed the view of anybody here (indicating) looking south, and which we claim obstructed the view of the motorman looking north." Defendant's counsel stated; "The charge of negligence in this declaration is - or complaint, rather, that we ran and operated this train at a high, negligent, dangerous rate of speed. That is one charge. The second charge is that we didn't blow a whistle when approaching the crossing". It would appear, therefore, that the jury was informed of the acts of negligence charged, and that the case was tried upon the issues presented. In the case of Dickson v. Swift Co., 238 Ill. 62, it was said;

"It has never been considered reversible error to refer the jury to the declaration unless they are required to determine a question of law as to what are the material allegations. (Fraternal Army v. Evans, 216 Ill. 629)."

In Belskis v. Bering Coal Co., 246 Ill. 62, where plaintiff in error complained of an instruction given by the court to the effect that defendant in error could recover if the case was proved as alleged

What appears in the record the court has not in analyzing the

photograph.

The defense also contends that there are certain errors in

giving instructions regarding the weight to be given to the

following instruction:

"If you believe upon a preponderance of the evidence that on or about July 2, 1937, Thomas Goodrich was struck and killed by a train of the defendant; and if you believe that the facts of the case in these Goodrich are substantially proven by the evidence of the defendant as charged in the complaint, then if you also find that Thomas Goodrich was both before and at the time of the accident in the exercise of proper care for her own safety, you should find the defendant guilty."

Defendant seriously contends that the giving of similar instructions has been repeatedly held reversible error and cannot be cured by other

instructions given by the court. When this question is so well so

obvious the statement made by counsel, "Defendant's counsel stated

to the jury the state in this case, and we should be proved to you,

that the defendant was guilty of a fatal error, if not guilty, by the

fact that there was a dense black forest of bushes and raspberry and

undergrowth right on the south-east corner, which obstructed the view

of anybody here (indicating) looking south, and which we claim

obstructed the view of the witnesses looking north." Defendant's counsel

stated: "The charge of negligence in this location is - or complaint,

rather, that we ran and operated this train at a high, negligent,

dangerous rate of speed. That is our charge. The second charge is that

we didn't blow a whistle when approaching the crossing." It would

appear, therefore, that the jury was informed of the rate of negligence

charged, and that the case was tried upon the issues presented. In the

case of Barth v. Miller, 200 Ill. 62, 63, it was said:

"It has never been established reversible error to refer the jury to the decision unless they are required to determine a question of law as to what was the material allegation. (Barth v. Miller, 200 Ill. 62, 63.)"

In Barth v. Miller, 200 Ill. 62, 63, where plaintiff in error

contended that an instruction given by the court was an error that

defendant in error could recover if the case was proved as alleged

in the declaration, the court said; "While the practice of giving such an instruction is not to be commended, it is not reversible error where every count in the declaration contains the necessary allegations for recovery." In the instant case defendant's counsel clearly indicated to the jury the charges that were made as to the operation of the train at a dangerous rate of speed and failure to blow a whistle. Although we do not altogether agree with the form of the instruction, we are of the opinion that defendant is in no position to object, having waived its right to do so by making a statement to the jury advising them of the allegations of negligence charged.

There is also some complaint made as to improper conduct of plaintiff's counsel, but we have carefully considered the matters complained of and are of opinion that there is nothing here which would justify a new trial. There was no request that a juror be withdrawn, but the outcome of the cause was submitted to the jury, and under the circumstances the defendant is not in a position to complain. A party having speculated as to the outcome of the cause and having submitted the cause to the jury, is not later in a position to complain. (C. & E. R. R. Co. v. Maech, 163 Ill. 305; Wettaw v. Retail Hdw. Mut. Fire Ins. Co., 287 Ill. App. 284.)

As to the verdict being excessive, this was a wrongful death case wherein the verdict was for \$5,000.00. The mother of decedent testified that decedent was a normal, healthy, alert child of eleven years who ran errands, participated in household activities and did all she could to help in them. Verdicts for the full statutory maximum of \$10,000 have been upheld in cases involving the wrongful death of minors (Petrovic v. City of Chicago, 251 Ill. App. 542, and Deaing v. City of Chicago, 321 Ill. 341), and we are of the opinion that this point should not be urged as a ground for new trial.



In the declaration, the court said: "While the position of a litigant such as this is not to be commended, it is not reprehensible even where every count in the declaration contains the necessary allegations for recovery." In the instant case defendant's complaint clearly indicated to the jury the charges that were made as to the operation of the bank as a business of fraud and failure to show a profit. Although it is not necessary to state with the facts at the declaration, as one of the reasons that defendant is in no position to object, having waived its right to do so by making a statement to the jury advising them of the allegations of negligence charged.

There is also some complaint made as to improper conduct of plaintiff's counsel, but we have carefully examined the entire record of and are of opinion that there is nothing here which would justify a new trial. There was no request that a jury be taken, but the nature of the case was submitted to the jury, and under the circumstances the defendant is not in a position to complain. A party having acquiesced as to the conduct of the case and having submitted the same to the jury, is not later in a position to complain. (U. S. v. G. W. Smith, 102 Ill. 200; Matter v. Smith, 102 Ill. 200, 102 Ill. 201.)

As to the verdict being excessive, this was a wrongful death case wherein the verdict was for \$10,000.00. The number of deceased justified this verdict was a normal, healthy, able-bodied man who was a housewife, engaged in household activities and did all she could to help in the home. Verdicts for the total statutory maximum of \$10,000 have been upheld in cases involving the wrongful death of minors (Matter v. G. W. Smith, 102 Ill. 200, 102 Ill. 201, and Matter v. G. W. Smith, 102 Ill. 201, 102 Ill. 202), and we are of the opinion that this verdict should not be upset as a ground for new trial.

After careful consideration of the questions called to our attention, we are of the opinion that the trial court was in error in sustaining the motion for new trial. Therefore, the order granting a new trial is reversed and the cause remanded with directions that the trial court enter judgment for the plaintiff on the verdict of the jury with interest at 5% per annum from the date of the verdict.

ORDER GRANTING NEW TRIAL REVERSED AND  
CAUSE REMANDED WITH DIRECTIONS THAT  
THE COURT ENTER JUDGMENT ON THE VERDICT  
WITH INTEREST AT 5% PER ANNUM FROM  
DATE OF VERDICT.

BURKE, P.J. AND KILEY, J. CONCUR.

After careful consideration of the questions raised by our  
attention, we are of the opinion that the trial should be held  
in accordance with the rules of the court. Therefore, the court  
has ruled in favor of the defendant and the same is hereby  
the trial court's judgment for the plaintiff on the verdict of  
the jury with interest at 6 per cent from the date of the verdict.

ORDER GRANTING NEW TRIAL REQUEST AND  
JURY VERDICT WITH INTEREST THAT  
THE COURT ENTER JUDGMENT IN THE VERDICT  
WITH INTEREST AT 6 PER CENT FROM  
DATE OF VERDICT.

WILLIAM F. L. AND FIRST, J. DUNN



41722

GERTRUDE HALL,

Appellee,

v.

ARTHUR O. McNAIR, doing business as  
McNair Liquor Store and McNair  
Building Corporation, a corporation,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

314 I.A. 672

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action under the Dram Shop Act for injuries to plaintiff's person. The jury found for plaintiff and assessed her damages at \$1,500.00. The court entered judgment on the verdict against both defendants and they have appealed.

The defendants seek a reversal of the judgment on the grounds that the manifest weight of the evidence shows the plaintiff did not exercise due care for her safety; that they were deprived of a fair trial by improper argument of plaintiff's counsel and the giving of a prejudicial instruction; and that the damages are excessive. It is not disputed that the plaintiff was injured or that her assailant's conduct was not justified.

Plaintiff, a mother 31 years old, walked to the McNair Liquor Store at about midnight Saturday, July 16, 1938, after she had drunk a glass of beer with her brother at a tavern. In the store she met a friend James Hill and other friends of his, at whose table she sat and had another drink. In the front part of the store there was a small bar, at which individual purchases were made and at the end of which a partition divided the front from the rear in which were about 18 or 20 tables with four seats at a table. In this part of the store patrons were served and here there was dancing. On the night in question most of the tables were occupied.



Shortly after plaintiff entered and while she and Hill were talking in a passageway to the only lavatory in the store, a fight started between plaintiff and another woman patron who, the evidence indicates, was intoxicated. The woman in passing plaintiff stepped on the latter's foot and plaintiff made a sharp remark to her which was returned by a blow from the woman. Plaintiff struck back and shortly thereafter was attacked and stabbed with a knife held in the hand of the other woman. Hill, in an effort to aid plaintiff, commenced throwing tables and chairs and in the ensuing confusion, the assailant and her male companion who appears to have furnished the knife, escaped. Later, plaintiff bleeding from wounds in her chest, thigh and side, was helped into a taxicab and taken to the Provident Hospital, and from there by police to the County Hospital.

Defendants contend that the evidence showed that plaintiff had been arguing with Hill, prompted the dispute with her assailant by a vulgar and profane remark, willingly participated in the affray which followed, was not an innocent party, and should not recover.

The jury heard the conflicting stories of the occurrence and we cannot say that plaintiff by any conduct attributed to her by either side, gave sufficient provocation to her assailant for either the blow or stabbing. The jury found by its verdict that plaintiff was in the exercise of due care for her own safety. We cannot say that the manifest weight of the evidence shows otherwise.

The defendant complains of the conduct of plaintiff's counsel in arguing to the jury. He says that counsel misstated the law and that the court by overruling defendant's objections confirmed the misstatements. The objections are to references made by plaintiff's counsel to the testimony of a court reporter, offered for the purpose of impeaching plaintiff. Plaintiff's counsel argued that fairness would have required the witness to read from his shorthand



identify either defendant with the man who was killed. In a conversation in the early January of the year, a light colored man, between defendant and another woman, who, the witness testified, was introduced. The woman in question testified to the fact that defendant's love and relationship with a young woman in the city was a matter of a few days. Defendant's name was not mentioned in the conversation and defendant was not with a light colored man in the city. The other woman, who, in an effort to kill defendant, was charged with the murder and charged in the murder case, the witness said that she was convinced the witness to have furnished the facts, which, in fact, defendant himself was unable to get clear, which, and also, was placed into a basket and taken to the prison hospital, and then sent by police to the county hospital.

The witness stated that the witness never met defendant had been engaged with him, through the witness who was not acquainted by a violent and violent means, although mentioned in the letter which followed, was not an innocent party, and should not recover.

The jury heard the defendant's story of the occurrence and we cannot say that defendant by any means intended to pay by either side, gave defendant permission to let defendant pay either the side or defendant. The jury found in the verdict that defendant was in the position of one who was not a party. It cannot say that the defendant's story of the witness was otherwise.

The defendant's testimony of the witness of defendant's conduct in regard to the jury. It was found that defendant was not the party by receiving defendant's testimony and by plain- the defendant. The defendant was in possession of the facts of the case and the testimony of a young woman, which was the purpose of impeaching defendant. Defendant's answer stated that the witness would have testified the witness to have been the defendant

notes what was formerly said by plaintiff. It is evident from a consideration of the entire argument and from questions and answers in the record, upon which the disputed argument is based, that counsel's reference was not intended as a statement of law upon the proper method of impeachment, but to call the attention of the jury to the manner in which the witness answered counsel's questions rather from memory than from his notes. We find the court ruled correctly and that defendants were not prejudiced by this reference. Plaintiff's counsel also in his argument said that the defendant, in fairness, should have submitted to plaintiff for her signature, the transcript of her former testimony before using it as an instrument of impeachment. The impeaching testimony included contradictions in plaintiff's past and present testimony relating to what she drank before the altercation; the age of her assailant and whether she staggered; whether her friend/<sup>Hill</sup> had, just prior to the altercation, danced with another person; and whether she had the name and address of the man who took her to the Provident Hospital. The trial court, after a discussion between counsel and the court on this point during plaintiff's cross-examination of the court reporter, sustained defendant's objections to questions about the absence of plaintiff's signature on the transcript. The court having sustained objections to the questions, should have sustained the objection to the argument based thereon. We cannot see that the argument and the ruling of the court had the grave effect which defendants claim. Plaintiff's counsel was talking of fairness, not law, and the court by its ruling could not have confirmed anything more than counsel's idea of fairness. We have concluded from a consideration of the impeaching testimony, in the light of all the circumstances of the case, that the defendants could not have been seriously prejudiced by this part of the argument, nor the court's ruling on defendant's objection thereto. Cases cited by the defendants on these questions of the

notes that was formerly said by Laidlaw. It is evident from a  
 consideration of the entire evidence and from the question and answers  
 in the report, that when the alleged statement is made, that  
 counsel's reference was not intended as a statement of law upon  
 the proper method of impeachment, but to call the attention of the  
 jury to the manner in which the witness answered counsel's questions  
 rather than merely from his mind, as if the jury were to  
 determine and that statements were not justified by this evidence.  
 Laidlaw's counsel also in his statement said that the statement, in  
 fairness, should have been submitted to Laidlaw for his signature, the  
 transcript of his former testimony before being it as an instrument  
 of impeachment. The proposed testimony included nonverbal  
 in Laidlaw's past and present testimony relating to what was said  
 before the statement; the way in which he testified and answers was  
 suggested; whether he signed the statement, that also in the statement,  
 signed with another person; and whether he had the same and answers  
 of the man who took part in the proposed statement. The trial court,  
 after a discussion between counsel and the court on this point  
 during Laidlaw's cross-examination at the second hearing, sustained  
 defendant's objection to questions about the absence of Laidlaw's  
 signature on the transcript. The court having sustained defendant's  
 objection to the questions, should have sustained the objection to the answers  
 based thereon. It cannot be that the argument and the ruling of  
 the court had the same effect which defendant claims. Laidlaw's  
 counsel was misled by fairness, not law, and the court by its  
 ruling could not have overruled anything more than counsel's idea  
 of fairness. It must be concluded from a consideration of the evidence  
 and testimony, in the light of all the circumstances of the case,  
 that the defendant would not have been properly prejudiced by this  
 part of the argument, nor the court's ruling on defendant's objection  
 thereon. Cases cited by the defendant on these questions of the



argument are based upon a misstatement of the law made in argument, consequently, this finding is not inconsistent with those cases.

The defendants presented other points based on the argument of plaintiff's counsel, but since no objections were made thereto at the trial, we shall not consider these points.

The defendants finally contend that the size of the verdict indicates that the jury exceeded the allowable elements of damage in the case and that such excess was probably brought about by an instruction given by the court on behalf of the plaintiff, which set forth section 135 of the Gram Shop Act, under which the action was brought. The instruction included this language of the section: "and for exemplary damages". Defendants argue that the wilful and wanton count in plaintiff's complaint had been withdrawn and, accordingly, no exemplary damages were allowable. We agree. No other instruction was given defining or referring to exemplary damages and an instruction was given which clearly limited the allowable damages to the proper elements. We cannot find that the disputed words in the instruction objected to probably impressed the jury or that any probable impression would survive the other instruction given on the question of damages. In Austin v. Bass, 211 Ill. App. 1, cited by defendants, the jury obviously must have been misled by an erroneous instruction which misstated the basis for exemplary damages. That case and the instant case are not parallel. The verdict confirms our view that the instruction was not prejudicial because we believe the damages as assessed are not excessive. Plaintiff was stabbed in the left chest, side and thigh and she suffered the loss of a great deal of blood before being taken on a stretcher to the County Hospital. Some of her wounds did not need stitching, but five of them required 27 stitches. She was in



the hospital a week, in bed at home a week and was treated by diathermy two or three times a week for a period of three weeks. It appears that while she was not working at the time of the incident, having shortly before been laid off, she was asked to return to work two months thereafter, but was unable to resume her work as a maid. She had worked for the same employer for about 5 years, earning about \$5.00 a week. At the time of the trial, which commenced more than two years after her injury, she was still unable to do the work to which she was accustomed. We think the damages were fairly assessed.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND REBEL, J. CONCUR.



the hospital a week, in fact it had a week and was treated by  
 physician. Two or three times a week for a series of three weeks.  
 It was not until she was not coming to the time of her  
 menstruation, having menstruated before her last visit, she was sent to  
 return to work two months later, but was unable to return and  
 went on a sick. She had known the two men working for many  
 years, working about 12.00 a week. At the time of the trial,  
 which commenced more than two years after her injury, she was  
 still unable to do the work in which she was accustomed. In  
 China the damages were fairly assessed.  
 For the reasons herein given the judgment of the  
 Circuit Court is affirmed.

RECORDED 10-1-11.

WILLIAM A. HILL, & COMPANY,

41822

PETER H. OFFERS,

Appellee,

v.

INTERSTATE MOTOR FREIGHT SYSTEM  
COMPANY, INC., a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

314 I.A. 673

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for plaintiff in an action for damages to his automobile resulting from a collision with an automobile truck at the intersection of South Chicago avenue and 76th street, Chicago. South Chicago avenue extends northwest and southeast and 76th street extends east and west. The trial was by the court without a jury and the judgment was for \$124.47.

Plaintiff testified that about 12:30 A. M. on December 8, 1940, accompanied by two girls, he drove southeast in South Chicago avenue and stopped at 76th street to wait for the traffic signal lights to change; that south Chicago avenue is about 70 feet wide and contains street car tracks, and at 76th street which is about 30 feet wide, safety islands are placed between the car tracks and the curb at the northwest and southeast corners of the intersection; that when he stopped, his car was on the tracks east of the northwest safety island; that he planned to turn east in 76th street; that while stopped he saw the truck about 80 feet away being driven in a northwesterly direction in South Chicago avenue between the southeast safety island and the southeast curb; that he proceeded into the intersection when the lights changed to make the turn; that meanwhile the truck came onward, but he did not know how fast; that the truck was still coming toward him when, after permitting several cars preceding the truck to pass, he saw an "opening", and

Edward J. Jozak

3-21-4

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314 I.A. 673

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One of the essential elements to be proved in the case was the agency between the driver of the truck and the defendant, its alleged owner. To impose on defendant the burden of showing that the driver was not its agent, plaintiff was required to make prima facie proof that the defendant owned the truck. Plaintiff's proof of ownership was meager and unsatisfactory. We shall not, however, dispose of this appeal on the question of agency.

At the time of the accident, Section 69 of Article IX, Chapter 95<sup>1</sup> Smith-Hurds Ill. Rev. Stats. was in force and it provides:

"Any driver of a vehicle approaching an intersection with the intent to make a left turn shall do so with caution and with due regard for traffic approaching from the opposite direction and shall not make such left turn until he can do so with safety."

Considering the time of the accident; type of intersection; plaintiff's view and knowledge of the oncoming truck and its position; and the slippery pavements and street car tracks, upon which plaintiff had to start and turn through an "opening", we believe that the plaintiff by failing to permit the truck to pass him, was guilty of contributory negligence. It follows, therefore, that the judgment xxxxxxxxxx cannot stand.

For the reasons herein given the judgment of the Municipal Court is hereby reversed.

JUDGMENT REVERSED.

DURKE, P.J. AND NEBEL, J. CONCUR.















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| 2/3/81  | A. H. B. W.   | 788 | 51500 |
| 3/26/81 | William P. J. | 641 | 0550  |
| 7-22-81 | J. J. J. J.   | 222 | 7330  |
| 8/3/81  | W. K. K.      | 283 | 6560  |
| 9/3/81  | R. J. J. J.   | 332 | 5195  |
| 10-20   | B. J. J. J.   | 826 | 7984  |
| 1-17-83 | J. J. J. J.   | 392 | 2020  |
| 1/17/83 | J. J. J. J.   | 876 | 7100  |

